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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 62.

JAMES GARDNER, PLAINTIFF IN ERROR

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED JULY 18, 1904.

(19,420.)

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1 Petition for Writ of Certiorari.

STATE OF MICHIGAN, }
County of Wayne, } ss:

James Gardner, being duly sworn, deposes and says that he is the defendant in a certain cause lately commenced in the recorder's court for the city of Detroit, entitled "The People vs. James Gardner," wherein it is charged on complaint of one Frederick V. Wilson, agent of the Detroit sanitary works, that this deponent did on the 26th day of March, A. D. 1903, within the limits of the city of Detroit, to wit, in an alley in the rear of the Griswold house, situate on the corner of Grand River avenue and Griswold street; also in an alley in the rear of the Ste. Claire hotel, situate on the corner of Monroe and Randolph streets, unlawfully and wilfully carry, convey and transfer through the streets and alleys of the city of Detroit, garbage, he not being the city contractor, or its agent, contrary to the ordinances of said city in such case made and provided, and contrary to section III., chapter 86, page 244, Revised Ordinances of 1895, as amended June 11th, 1901; a copy of which complaint and summons appears in a certified copy of the journal entries in said cause hereto attached and made a part of this affidavit; a copy of which said ordinance is also hereto attached and marked Exhibit "A" and made a part of this affidavit.

Deponent further says that on the 7th day of April, 1903, he appeared in said court in response to the said summons, and entered a plea of not guilty and demanded a jury trial; that said cause was adjourned from time to time until the 27th day of May, 1903, when it was brought on for trial before the Honorable Alfred J. Murphy, one of the recorders for the city of Detroit. That a jury was duly empaneled from the regular panel of jurors in attendance in the recorder's court for said city of Detroit. That after said jurors had been drawn and sworn as to their competency, and before they had been sworn to try the issue, deponent filed a challenge to the array of jurors, a copy of which is hereto attached, marked Exhibit "B" and made a part of this affidavit. That the people thereupon demurred orally to said challenge to the array, and after argument the court sustained said demurrer, to which ruling deponent through his counsel, then and there excepted. That jurors were thereupon sworn to try the issue. The trial proceeded and testimony was introduced, as shown by Exhibit "C" hereto attached and made a part of this affidavit, and that Exhibit "D" attached hereto is a true copy of the contract offered in evidence by The People on the trial of said cause.

2 That after all the evidence had been introduced, deponent's counsel demanded the right to address the jury upon the questions of law and fact and moved the court to submit to the jury

the questions of law and fact involved in this case, which motion was overruled by the court. To which ruling deponent's counsel then and there excepted. Deponent's counsel thereupon moved the court to direct a verdict of not guilty. The People thereupon moved the court to direct a verdict of guilty.

After argument the court announced that the questions involved were legal ones for the court to pass upon and that he would direct a verdict and held the matter under advisement until June 6th, 1903, and then and there overruled deponent's motion to direct a verdict of not guilty and then and there directed a verdict of guilty, and a verdict of guilty was duly recorded under the direction of the court. The court thereupon passed sentence upon deponent and imposed a fine of $10 and in default of the payment of said sum, that deponent be confined in the Detroit house of correction for a period of five days.

That upon motion of deponent's counsel the court granted twenty days' time for deponent to perfect an appeal; that later, and on the 24th day of June, 1903, the court granted ten days' further time, dating from the 26th day of June, 1903.

That the foregoing with exhibits attached is a substantial statement of all the proceedings had before said court in said cause, and substance of all the testimony produced before said court and jury on the trial of said cause. And that Exhibit "C" hereto attached contains a correct statement of all the proceedings on the trial of said cause that are material for the hearing in this court.

Deponent further says that he is advised and he alleges that said judgment, verdict and sentence are erroneous and should be reversed for the following reasons:

1. Because the court erred in overruling deponent's challenge to the array of jurors.

2. Because the court erred in refusing to submit to the jury the questions of law and fact involved in said cause.

3. Because the court erred in overruling deponent's motion to direct a verdict of not guilty.

4. Because the court erred in granting The People's motion to direct a verdict of guilty.

5. Because the ordinance of the city of Detroit, being section III., chapter 86, page 244, of the Revised Ordinances of 1895, as amended June 11th, 1901, being the ordinance upon which this proceeding is based, is null and void, being contrary to article VI., section 32, of the constitution of the State of Michigan, in that it deprives citizens of their property without due process of law.

6. Because said ordinance is contrary to the XIV. amendment of the Constitution of the United States, in that it deprives citizens of their property without due process of law.

3 7. Because the common council of the city of Detroit has no power or authority under its charter to pass said ordinance.

8. Because said ordinance is unreasonable, unjust, and its enforce-

ment will result in depriving citizens of their property without compensation and without an opportunity to be heard.

his
JAMES x GARDNER.
mark.

Subscribed and sworn to before me this 30th day of June, A. D. 1903.

EMMA McMULDROCH,
Notary Public, Wayne Co., Michigan.

EXHIBIT "A."

CHAPTER LXXVI.

Garbage.

(Approved August 8, 1889.)

SECTION 1. It is hereby made the duty of the occupant or occupants of every dwelling house or other building in the city of Detroit to provide a suitable and water-tight box or other vessel of a convenient size to be handled by the garbage collector, in which such occupant or occupants shall cause to be placed or deposited, all offal, garbage and refuse, animal and vegetable matter of the premises.

Such occupants shall keep such box or other vessel in the alley in rear of such premises, or at a place on the premises most accessible to the person collecting the garbage and offal, and it shall be unlawful to put any but refuse animal and vegetable matter in the vessel used for garbage and offal.

Provided, that if the said receptacle is placed in the alley it shall be provided with a tight cover, properly hinged, and shall be located next to the lot line, and from which it shall not project more than two feet into the alley. (As amended September 20, 1892.)

An ordinance to amend secs. 2, 3, 4, and 5 of chapter 86 of the Revised Ordinances of 1895, and to repeal sec. 2 of chapter 87, Revised Ordinances, 1895.

It is hereby ordained by the people of the city of Detroit:

SECTION 1. That secs. 2, 3, 4 and 5 of chapter 86 of the Revised Ordinances of 1895 be, and the same are hereby amended so as to read as follows:

4 SEC. 2. The word "garbage" shall be held to include every refuse accumulation of animal, fruit or vegetable matter that attends the preparation, use, cooking, dealing in or storing of meat, fish, fowl, fruit or vegetables, including dead animals and condemned foods found within the city limits. All garbage shall be collected

in water-tight closed metal boxes, and such boxes shall be purified as often as the health officer may direct, and shall have painted thereon the word "Garbage."

SEC. 3. It is hereby made the duty of the contractor with the city of Detroit for the collection and removal of garbage and dead animals to collect and remove in accordance with the ordinances and contract of the city, all garbage, dead animals, fish and refuse animal and vegetable matter found within the city limits. No other person or party except the city contractor or its agents shall carry, convey or transport through the streets, alleys or public places of the city of Detroit such materials, and it shall be unlawful for any person to interfere in any manner with the collection and disposal of such materials by the city contractor.

SEC. 4. It shall be unlawful for any person to deposit, throw or place any garbage, fish, dead animals or refuse animal or vegetable matter in any avenue, alley, street or other public place within the city of Detroit; nor shall any person place such materials upon any private property, whether owned by such person or not, unless the same shall be enclosed in proper vessels or boxes, as provided in section 1.

SEC. 5. The collection and removal of garbage shall be under the supervision of the board of health and it shall be the duty of the board of health and police department, through their proper officials and agents, to enforce the provisions of this ordinance.

SEC. II., chapter 87, and all other ordinances in conflict herewith are hereby repealed.

SEC. 2. This ordinance shall take immediate effect.

Approved June 11th, 1901.

WILLIAM C. MAYBURY, Mayor.

Attest:

JOHN A. SCHMID,
City Clerk.

5 EXHIBIT "B."

STATE OF MICHIGAN:

In the Recorder's Court of the City of Detroit.

THE PEOPLE OF THE STATE OF MICHIGAN }
vs. }
JAMES GARDNER. }

Challenge to the Array.

A jury of twelve jurors having been drawn and taken their seats in the jury box for the trial of this cause, the said defendant James Gardner challenges the array of said jurors in writing for the following reasons:

1. The lists of jurors from which said jury was drawn and summoned were not made and returned by the supervisors, assessors or aldermen of the several wards of the city of Detroit as provided by section 318 of the 1 Comp. L. of 1897, p. 231.

2. The lists of jurors from which said jury were drawn and summoned were made out and returned by the board of jury commissioners for the county of Wayne, created by act No. 204 of the public acts of Michigan, 1893, p. 337.

3. Under the constitution and general laws of Michigan the lists of petit jurors for the trial of civil or criminal cases in courts of record are permitted and required to be made by local officers elected by the people in each township and ward of the city, and the jurors are required to be taken from the assessment roll of the township or ward, and act No. 204 of the public acts of 1893 authorizing a board of commissioners appointed by the governor of the State, with the consent of the State senate, to select and return the lists of petit jurors for service in the courts of record sitting in said county is in conflict with the provisions of the fourteenth amendment of the Constitution of the United States that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

4. The constitutional and legal nature of a jury trial is such that the denial to one part of the people of the State of the right to be tried by locally selected jurors is a denial of the equal protection of the laws within the meaning of the fourteenth amendment of the Constitution of the United States.

5. Act No. 204 of the Michigan Public Acts of 1893, p. 337, is in conflict with the fourteenth amendment of the Constitution of the United States and is unconstitutional and void.

6 6. Said act is in conflict with the provisions of the constitution of Michigan that one supervisor and one township clerk shall be elected in each township and that a sheriff shall be elected in each county, and that in every criminal prosecution the accused shall have a right to a speedy and public trial by an impartial jury.

Wherefore the said defendant prays that the said jury impaneled for the trial of this cause may be quashed.

JAMES GARDNER, Defendant.

FRED A. BAKER,
J. H. CLARK,
Attorneys for Defendant.

EXHIBIT "C."

The Recorder's Court for the City of Detroit.

THE PEOPLE, Plaintiff,
vs.
JAMES GARDNER, Defendant.

On the 27th day of May, A. D. 1903, came The People, by Charles E. Love, assistant corporation counsel, and Corliss, Andrus, Leete & Joslyn, of counsel, and defendant James Gardner personally and by Joseph H. Clark and Fred A. Baker, his attorneys. The jury having been duly impaneled and sworn to try the issue between The People and the said defendant. To maintain the issue on the part of The People, the following testimony was introduced:

FREDERICK V. WILSON, being duly sworn on behalf of The People, testified as follows:

I am inspector for the Detroit sanitary works; have been for a year or more. My duties are to look around to see how the garbage is being collected, who is collecting it and watch outside collectors, if there are any. It was my duty on the 26th day of March, 1903. I was on duty on that day at the Griswold house and I rode around following James Gardner, the defendant in this case, a collector for Mr. Cooper. He came to the Griswold house and took the garbage from there; garbage consisting of refuse from the tables, fowl,
7 meats, fish, lobsters and bread, boiled vegetables, salads and pies and everything of that kind right from the table, I should judge.

Mr. Gardner had a wagon with a large wooden box, and I should say there was a lining perhaps six inches down under the cover, turned just as far as the cover of the wagon; so if anyone should raise up the cover of the wagon and look into the wagon when the wagon was loaded, they would see a tin lining; but when the box is empty this lining only runs down about six inches and just reaches the whole length of the case. There wasn't any name on the wagon of any kind.

This testimony is objected to on the ground that the only charge in the complaint was that the defendant was hauling garbage through the streets, not being a city contractor.

Objection overruled.

I first saw Gardner that day coming across Washington avenue; I first saw him drive in the alley in the rear of the Griswold house and take off the cover of his wagon and let down the pan that run from the chute into the wagon, open the chute and load the garbage in. The garbage was in an iron chute which runs from the kitchen,

reaches out into the alley; he took the garbage from the chute. There is a screw in the bottom, a cave-in. It is screwed with a large screw they unscrew and that turns the bottom up and drops the garbage out.

He next came over across Woodward avenue, over to the Ste. Claire, and collected garbage there in the same manner. They have a chute there in the same manner. On that day I think there was something the matter with the chute. He drove under the chute and by going in upstairs he jammed it into the chute and let it run through.

He then drove out across, over, by and through these streets and over to Fort street and went out Fort street, clear out, pretty
8 near to the city limits; then he went north to the Dix road and out the Dix road, I should judge about a mile outside of the city limits. There he fed the garbage to the hogs. I saw him feed it to the hogs the next morning. I was out there the next morning. The garbage was in pretty bad shape, I should say. It smelled pretty bad anyway. There was an odor arising from the garbage taken from these two hotels; rather an offensive odor; I could not explain just exactly what the odor was.

Cross-examination:

I have been employed by the Detroit sanitary works about a year and four months. By the sanitary works I mean the company who contracts with the city for the gathering of garbage. Their factory is located at French landing. They have a factory there using up this material; that is where they manufacture it into fertilizer; their business is the manufacture of fertilizer; they manufacture it out of the garbage that they collect from the city. At least they make some fertilizer out of it, I know that, and they sell the fertilizer. I suppose this material that they gather is of value for that purpose to manufacture into fertilizer.

One of the things I am employed for is to go around the city here and see that nobody gets their garbage; that is a part of my duty. When I looked up Gardner it was to see whether he was getting any of the garbage or material that the contractor claimed by virtue of his contract with the city. I have seen Gardner with a load of garbage several times. He went to the Griswold house first, took the material from the chute that runs down from the kitchen, at least from the second floor. It was about eleven o'clock when he got it on the 26th. He didn't call there in the afternoon.

The Detroit sanitary works only gather garbage in the down-town districts once a day; twice a day if it is necessary, some
9 places. I don't know what their contract with the city is. Their contract is to gather it once a day, I know, but they do sometimes gather twice a day.

I think even if that material was the leavings from the supper table the night before and breakfast table that morning, at that time

of the year it could be spoiled. I suppose it would be worse during the summer. I don't know whether it would be necessary to gather it from the Griswold and Ste. Claire hotels twice a day in the summer, or not. The sanitary works use metal boxes, iron box wagons with covers running the whole length of it. There are four covers on one of these wagons; these boxes are lifted off the wagons and set on the cars and shipped on. The word "garbage" is printed on the metal boxes. I presume that one can smell the wagons of the sanitary works as far as they could Cooper's wagon.

JAMES CLUFF, sworn for the People, testifies as follows:

On the 26th day of March, 1903, I was working in the Griswold house in the kitchen; I was helping in the pantry part of the time, emptying garbage cans and general assistant around the kitchen. I know what kind of garbage was allowed to go through the chute of the Griswold house on that day. Everything of the refuse from the house, such as parings of the vegetables, any rotten vegetables, fruit, and all refuse from the butcher shop, such as spoiled fish. I seen some very badly spoiled fish go into it; spoiled meat, rotten bananas, banana peelings; all the refuse from the table, such as lettuce with vinegar on it scraped off the plates as it came from the table by the dish-washer; all the meats, gravies, anything that was left on the plate, scraps of pie. Everything; all the refuse from the house went into the garbage.

After the garbage wagon came in I went down and looked into the box and seen the stuff that I had helped put into the chute down into the wagon. Some of the material was decayed and rotten. There was an odor attached to the material that was put into the chute. James Gardner took the garbage from the Griswold house on that day; I saw him draw it out to Cooper's farm. They hitched one horse ahead of the horse they had on it and drove out into the lot as far as they could. The mud was clean around the axle; they could not get to the hog pen so they unhitched and left it there until the next morning. The next morning I was there and saw them take it out of the wagon and draw it out into the hog pen with two horses. It was naturally a little more decayed than when it went out; a little more sour and smelt worse.

Cross-examination:

I was general help in the kitchen of the Griswold house; helping in the pantry and helping clean up after the meal was over. I was employed by the Griswold house and also by the sanitary works. I was in the employ of the sanitary works when I was employed by the Griswold house. The Griswold house didn't know that. I didn't tell them. I was there for the purpose of informing the sanitary works; to see what went into the garbage. I was to report to the sanitary works. I went there on the 26th; I was there until the 27th.

After Mr. Gardner came and collected the garbage, then I got out. Mr. Gardner removed the garbage from the Griswold house once a day. The garbage that he took was the accumulation of 24 hours. I saw four fish that were decayed. The cans in which the garbage was placed — in the butcher shop just adjoining the kitchen. The chute was in the room adjoining the butcher shop; where the vegetables were prepared for the table. The door opened from the kitchen right into the vegetable room. All kinds of fruit and such leavings
11 as came from the dining-room table went into the garbage. Anything that went to the table was considered fresh, but when they put vinegar on lettuce and such stuff as that, and then going in on top of these gravies and meats, and such stuff, it naturally would sour. I would not say that it was fermented. Parings of potatoes were thrown in there; we cut out the rotten spots in the potatoes.

JOHN E. CLARK, sworn on behalf of The People, testifies as follows:

I am a physician and chemist have been since 1877; am county chemist. I am connected with the Detroit College of Medicine as professor of chemistry and toxicology. I heard the testimony of the last witness in reference to the material that was gathered from the Griswold House kitchen and put into defendant's wagon. The effect upon the material, if thrown into the receptacle or chute, such as described, during the day and permitted to stand there 24 hours would be that decomposition would take place.

This testimony is objected to on the ground that the ordinance does not forbid the material being loaded on wagons and fed to hogs and it was not fed to hogs inside the city of Detroit.

Mr. BAKER: All we want to litigate in this case, if we can, in some way, is whether the city of Detroit can prevent a person who owns such swill, if he takes proper care of it, and takes it out of the city and feeds it to hogs, doing so. That is the case that ought to be passed upon by the court. There is a ton of garbage collected in the Russel house in a day and what we want to try is the right of the city of Detroit to confiscate that property. That is the question that we would like to have presented in this case and what I would seek to avoid would be any collateral issues, as to the way in which it is handled, because if it is not handled properly we will have it handled properly.

12 Objection overruled. Exception for respondent.

Witness continues: Decomposition would commence almost immediately in most cases; dependent to a certain extent upon the temperature. If the material was composed of decayed fruits, some decayed fish, some decayed meats and vegetables, and also the refuse from the tables, salads, etc., the effect of feeding such material to animals, the meat and milk of which was intended for human food, would, in

my opinion, be injurious. Diseases have been communicated by fermented and decomposed material being fed to animals. Cattle are particularly sensitive. Change of diet, for instance, of a cow, would have an effect not only on the color of the milk, but the taste of the milk. Birds that feed upon certain foods become that they are unfit for human use. Vultures that feed on other flesh are not fit for food. Carrion and garbage would mean somewhat the same, although not identical. I do not believe that this material would be fit food for hogs or that it should be fed, because decomposition undoubtedly took place before the food was taken to the hogs. That is according to the testimony that I heard, and they would be eating decomposed material. I refer more particularly to the entrails described, and game, sweepings from the table; not so much decomposed vegetable matter as animal matter. It would produce a poisonous compound as a result of decomposition, and this poisonous compound would affect these animals.

Cross-examination:

I am not an expert on feeding animals. I never fed hogs swill in my life; I have seen it fed. I have seen pigs that have been raised on swill; may have eaten some of it. I would say that swill, as I understand it, is not unhealthy for hogs. It is if you call this swill that has been described. Such material coming from a
13 farmer's table I should say was not injurious, but from hotel tables, I should say most decidedly yes; that it would not be proper food. The proportion of decomposed material that is injurious is a great deal in excess in a hotel table to what it would be on an ordinary farmer's table, according to my experience in eating at different places. In the second place, the fermentation which is considered as one of the worst features in the feeding of this material would take place if the material was prepared and given to the animals as testified to by the two witnesses whom I listened to, on the stand. I have eaten game that was tainted. I know that some people hang it up until it is tainted before they eat it. I know that game is hung up until changes take place in the muscular fibres, and it has a tendency to make the muscular fibres more thick. I think that is the reason it is preferred. The decomposition, however, has not gone on. I don't know much about raising hogs. In my opinion, garbage from the hotel should not be used to feed hogs. I have analyzed garbage that has been brought to me by the garbage works nine or ten years ago. I never examined garbage from one of these hotels. I believe that the collection of material such as is sworn to by the witnesses, if it is fed to hogs after 24 hours, and allowed to decompose with a large amount of animal matter, as testified to, would be injurious. I base my judgment on the cleanings of the kitchen; entrails of birds, of course, enter into it, but the dead fish and the cleanings of fish and the pieces of meat and the majority of birds that are eaten, I believe go into the garbage; I believe

the majority of them that are eaten, and the majority of all the food that is served in the shape of meats, goes into the garbage pails. I think it would be less injurious if the meats were removed. That is my opinion. If all the meat were put into a can by itself, fermentation will start in less than two hours, under favorable circumstances. I was never in the slaughtering business. I have no knowledge of the different conditions and the different ways feeding hogs has on the flesh; I have no knowledge. I don't know the difference between a corn fed hog and one that is fed on distilled swill. I know the difference between a hog fed on corn and a swill hog, and I know the difference in the market price. I don't know the difference between a hog fed on corn and clover and one fed exclusively on corn.

THEODORE SCHMALSREIDT, sworn on behalf of The People, testifies as follows:

I am a physician; practiced nine years; I am health officer of Springwells. I know Cooper and his place of business. Have visited it frequently, about once a week in the summer time and sometimes twice a week. I am not positive whether I was there in March, 1903. I have been there within the last three months. I have observed the material that he brings there from the city. I have seen him feed it to the hogs.

Q. The testimony given here is that garbage taken from the Griswold house, consisting of the refuse from the table, some decayed fish, entrails of fowl and birds, decayed fruit and vegetables and things of that kind, were gathered from the table in the kitchen and dumped in the chute, part of it standing over night, and the next morning taken out in the country to Mr. Cooper's place and fed to animals. State whether in your judgment, it is deleterious to feed hogs such material?

Objected to as incompetent. Objection overruled. Defendant's counsel except.

A. It may be. The reason why is because certain poisons may develop in the system of the hog and be transferred to the human system when eaten, when the meat is eaten. It would depend upon the temperature as to when decomposition and fermentation would commence. But I should say under ordinary conditions in a few hours.

Cross-examination:

I am health officer of Springwells; not in the employ of the sanitary works. I have been out to Cooper's place as health officer. Sometimes he would have about fifty or a hundred and sometimes from three hundred to five hundred hogs on what you would call a large tract of land. I don't know how many acres. I was there several weeks ago. I think the hogs were then on a piece of land

fenced in in the field, fenced in. There were troughs and places to feed them. I saw them eat. They seemed to enjoy it. I think I was about three-quarters of an hour last time. Never made any chemical analysis of the swill. It appeared to be table refuse from the hotel; some liquid in it; about like swill, as I used to see it. The field may have been a quarter of a mile long.

MARVIN CHAMBERLAIN, sworn for the people, testifies as follows:

Contract between the city of Detroit and the Detroit sanitary works offered in evidence. It was admitted by defendant's counsel that that was the contract between the city and the Detroit sanitary works. It was objected to on the ground that it was not a legal contract under the charter and ordinances and not valid evidence against defendant in this case. Chapter 86 of the Ordinances of the City of Detroit, as amended June 11th, 1901, pages 343, 344 and 345 of the Revised Ordinances of the City of Detroit, offered in evidence and received. Objection to the admission of the contract. Objection overruled; exception by defendant.

A further objection was made to said contract that it was not properly let and that the charter did not confer upon the council the right to pass such a one.

16 Objection overruled and exception taken.

WITNESS proceeds: I reside in Detroit. I am secretary and manager of the Detroit sanitary works. I have charge of the employing and discharging of agents of that concern, for the purpose of collecting garbage from the city of Detroit.

It is here conceded by the defendant that the defendant in this case was not an employé of the Detroit sanitary works in March, 1903.

Cross-examination:

The sanitary works is out at French Landing, twenty miles out on the Wabash railroad, in the township of Van Buren, near the village of French Landing. We take the garbage down there by railroad. We have a kind of a flat car especially made. We take the boxes off the wagons and put them on the car and take it down to the factory at French Landing and reduce it to manufacturing products. The principal product is grease. It is used for candles and soap. We make it into a valuable bi-products. We have made a little fertilizer at our works, but not successful. We sell this bi-product to men who make fertilizers. The material that we make is an element that is used in making fertilizers and grease. We take around 20,000 tons of garbage out of the city every year. I think the wagon boxes are nine feet four inches long and I think about three feet wide, thirty inches, perhaps. They are lifted from the wagons to flat cars by derrick. We have a large number of wagons engaged in gathering garbage in the city. I think we have complied with our contract.

People rest.

SAMUEL BRADT, sworn on behalf of defendant, testifies as follows:

17 I am steward of the Griswold house; have been steward of the Griswold house five years; was steward in March, 1903. I don't think I know Gardner, the defendant; I know Mr. Cooper, being the man who came to the hotel to get the leavings from the table. Mr. Cooper has a contract, I understand, with the Griswold house, to pay so much a month for this material. He pays $7.00 per month, $5.00 for one part and two for another. He was carrying out that contract in March, 1903. During the cold weather and up until the present time he has been removing it once a day. From now on it will be twice a day. The arrangements were that during the warm weather he is to take it twice a day. Whenever I notify him it is necessary he takes it twice a day. He was doing that last March.

Q. State whether or not it is necessary for the Griswold house to have this material removed in the summer time twice a day?

A. Only if our business is larger, our chutes get full, it isn't large enough to take care of the amount of business; we have it removed because we have more vegetables now.

So that aside from the financial benefit to the Griswold house derived from it, it is necessary that in the summer time it be removed twice a day; both morning and evening. Under our arrangement with Cooper he is to remove it twice a day whenever we notify him it is necessary. The material accumulates from the different departments; what comes back from the dining-room; people send up meats, more or less gravy, potatoes, a radish or two, tomatoes or something like that, cuts and pieces of meat are spilled or smeared over with gravy, and one thing and another. That is from the dining-room. That is made up from the leavings from the table; there are trimmings, of course; we cut off a fish's head, and of course that is put in there, and potato peelings.

18 Q. State whether or not there are any decayed meats go into that receptacle?

A. Well, now, I wouldn't say. That is a kind of a peculiar question to answer. Those things are liable to occur. I will state to you this. We have had a large fish box down stairs and about once a week we went to it and took out all the ice and put in fresh ice. Occasionally a fish may slip down between the ice and the side and remain there for three or four or five days. It would be in a condition that we wouldn't put in on our table, that doesn't occur very often. In a week we wouldn't get out maybe two fish. We don't intend to have spoiled meats around our hotel. Occasionally it might occur. Sometimes it would be in a private house. You might not want to eat it yourself, but still you wouldn't consider it spoiled. If it ever occurs it would be very infrequently. It is a part of my business to see that such things do not occur. If it did I would lose my position. The material that goes in there is leavings from the table, parings of potatoes and fruits and so on from

the kitchen. Trimmings from the butcher shop don't go in there; these go into our stock kettle; the trimmings from our loins, strips of meat, and tenderloins are put into an oven and tried out for grease, as you try lard. This material is accumulated and kept until the wagon comes in a large iron chute. The chute begins in the vegetable room adjoining what we call the butcher shop next to the elevator, and goes out into the alley. The wagon in loading drives up to that chute, raises up the cover and lets the material into the wagon box. The mouth of the chute is between ten and twenty feet of the back door of our café. We have never had to close the café door yet; have left it open and we never have to close it. I don't think there is any offensive smell from this material; we never have the cover down. It is for the benefit of every-
19 one to remove it before it ferments. We could not afford to have a lot of stuff smelling around there.

Cross-examination:

The contract was made between Postal & Morey, myself and Mr. Cooper; it was a verbal contract; at least I think so. I was present and took him to Mr. Morey to talk the matter over. I was there on the 26th of March. I am in the kitchen two-thirds of the time, yes, one-half of it anyway. I go through the vegetable room to the kitchen. I don't know whether there was any decayed fish there on the 26th. We have poultry at the hotel every day. They put all the entrails from the poultry in the chute. The poultry is received in the morning; the butcher cleans them; he has them all cleaned by six o'clock. They are put into the chute and before ten o'clock they are on the wagon and gone. All the chickens are cleaned when they are first brought in. The entrails have no bad odor; if they had we could not use the chickens. Of course, there must be some odor. The sanitary works does not collect any garbage from this hotel, this year, to my knowledge. I don't know whether they were permitted to. If they do they take it without my knowledge or any one around there.

ELI COOPER, sworn on behalf of defendant, testifies as follows:

My residence is Lynsburg, Michigan. I am engaged in the business of feeding swine. I buy hogs and sell them; I keep the hogs at Springwells; I have a place there for that purpose; it is about two miles from the city limits. I have been engaged in that business for three years. I have about twenty acres of land all together in one body. On that twenty acres I have an enclosure in which I keep hogs. I know the Griswold house and Ste. Claire; I
20 know James Gardner; he is an employee of mine; was in March of this year. At the time he was arrested he was drawing the swill, driving one of my wagons. At that time I was purchasing the so-called garbage or material from the Griswold house and also from the Ste. Claire hotel; I have done so for the

past three years; I had a contract with these two hotels. I pay the Griswold house $5.00 per month for one kind and $2.00 per month for another, $7.00 per month altogether. I paid the Ste. Claire $5.00 per month. The contract with the Griswold house was verbal. In the first place, I took it for a year and have always continued right along, extending it from time to time. I think I gave them $75.00 the first year; since then it has been $7.00 a month. Under this agreement I was to remove this material in the summer time twice a day, Sundays and all; in the winter time once a day. Just received an order to-day to take it twice a day. I am subject entirely to their order, in reg-rd to that. I know what kind of a chute they have. I take this swill and have it drawn out on my farm in Springwells and feed it to the hogs; have been doing that for over three years. I keep from 150 to 300; sometimes get down as low as 100. I buy light weight hogs from the stock yards that the dealers do not use and either ship them to Buffalo or sell them here. That gives me a chance to buy these pigs on a margin. I keep them from two to three weeks, if they do nicely, then I drive them to the yards and put some more in their places. I don't fat- these hogs at all; just keep them about two or three weeks. During the interval that I keep them there I feed them this material that I got from the Griswold house and Ste. Clair hotel.

I have been in the hog business all my life. I am a farmer and have been a hotel keeper myself for twenty years. I call
21 this material the very best feed for hogs; hogs do well on it; do better than on corn. I have been familiar with farming all my life. From my experience as a farmer and being familiar with these things, I would state that I have had good success in feeding this material to hogs. It is true that it is the almost universal custom on the farm to feed hogs similar material, that is, such as comes from the table of the farmer. I never knew a farmer to throw his swill away.

It is true that on a farm potato peelings, apple peelings and all such things go into the swill barrel generally and become food for hogs.

The defendant, James Gardner, was in my employ on the 26th day of March. When this material comes from the hotel I call it fresh. I have tasted it a good many times to see. I don't think there is any offensive smell arising from it, more than usually comes from fresh material of that kind mixed together. I don't keep it that long; all I draw to-day would be fed up this afternoon. So it is usually used up as rapidly as it comes. We have to keep the plant clean there. It is fed up every day; it don't remain. I don't undertake to fatten hogs there; I don't keep them long enough. They average about 100 pounds; anything running from 80 pounds to 120 pounds, what we call pigs. Full grown hogs usually weigh more than that, 200 to 300 pounds, some running as high as 400 or 500. These pigs that I buy and keep are growing pigs and simply keep them from two to three weeks until we ship them East to

Buffalo; we do not undertake to fatten them. You cannot grow a pig very fast on corn. You might take those pigs the same way and give them what corn they will eat and the first week they will do well if they hold whole. I don't think they will gain a pound. This swill is especially useful in growing pigs.

22 Cross-examination:

I have been prosecuted out there for maintaining a nuisance. Not where I take the material now; where I did take it. I have fed some of this stuff to cattle in the winter time; not this time of year. I did feed some in cold weather, not much. I have been feeding hogs this stuff pretty much all my life. I feed these hogs from two to three weeks. I go down to the stock yards and buy these hogs. Take them out to my farm, feed them two or three weeks and ship them to Buffalo. I don't deny that Mr. Gardner was carrying this stuff through the city of Detroit on the 26th day of March. I should say he was, although I didn't see him. I intended that he should.

By Mr. BAKER:

I use a wagon, wooden box lined with galvanized iron. There is one of them right down there now. There is a cover on it. The difference between my wagon and the sanitary wagon is that the sanitary wagon has less top, you see they flutter anything that comes up when they are overloaded oozes out. You can see them any time along the streets. The top on my wagon goes down closer; the sanitary works can't put their wagons full without having it go over the edges. We can have a wagon exactly like one of those if that is the question. No one ever made any complaint that I know of that I was not using the right kind of a wagon. If so, I have no recollection of it. I think my wagons very much cleaner than the other wagons. I try to keep them clean. Because of the construction of the cover for one thing; that has a great deal to do with it; theirs clatters along and lets the stuff out. They are a bad wagon, a garbage wagon to keep clean. Mine are wooden boxes lined with metal. The outside is wood lined with galvanized iron down to the bottom. I have only two. I have a similar
23 contract with the Russell house. I pay them $120 per year and the material that I get from there is the same as we get from the Griswold house and Ste. Claire; about the same thing. I don't think there is any difference between this hotel garbage and that of an ordinary house. It is just what we commonly call swill; that is all there is to it. I don't see any difference. You get more of it, that is all; it is the same stuff. I think there is a larger proportion of waste fish at the hotels than an ordinary farm house. It is meat and flesh just as comes from the table.

(It is agreed by both sides that the introduction of the testimony of the steward of the Ste. Claire is waived and it is agreed that if called he would testify substantially as witness Bradt testified.)

Defendant rests.

Mr. Love, attorney for The People, thereupon moved the court to instruct the jury to bring in a verdict of guilty.

Mr. BAKER, on behalf of the respondent: If the court please, on behalf of the defendant, I ask the court to instruct the jury that this is an ordinance case and they are the judges of law and fact; and in that connection I ask permission in the argument to the jury to discuss the law.

(Then follows a discussion of the request made by Mr. Baker, asking the court to instruct the jury that they were judges of law and fact and for permission to argue the questions of law and fact to the jury, after which the court overruled and denied the request; to which ruling defendant's counsel excepted.)

Counsel for defendant thereupon requested the court to charge the jury that the ordinance was unreasonable and void and to
24 bring in a verdict of not guilty. And further, that the garbage or swill accumulated at these hotels is property and that the common council of the city of Detroit has no right to confiscate it or dispose of it, and can only regulate the handling of it; that is, they can only adopt such reasonable requirements as protect the public health, and cannot go beyond that under the police power, unless they compensate the owner for the property. That is, the State of Michigan, either by its legislature or its courts, deprives the owners of property of this property without compensation, by such an ordinance as this, they deprive them of their property without due process of law and deny them the equal protection of the laws guaranteed by the 14th amendment of the Constitution of the United States. That so far as this swill is property it is entitled to the protection of the Constitution, and that this ordinance is unreasonable and void, because it undertakes to dispose of that property without compensation and without any regard to the question whether it has been properly stored. And asks the court to instruct the jury for that reason and bring in a verdict of not guilty.

The jury was thereupon excused until further date.

Several questions of law arising were taken under advisement by the court, and on the 6th day of June, 1903, charged the jury as follows:

GENTLEMEN OF THE JURY: It is undisputed that the defendant conveyed through the streets of this city what the ordinance herein invoked defines as "garbage." The term as employed, embraces only articles which were unsuitable for human food. The ordinance does not extend to anything that is fit for human consumption. The legislature, clearly acting within the police power of the State, has specifically authorized the city to contract for the collec-
25 tion and removal of garbage. Under this legislative authority, the municipality has sought by contract to give the exclusive right to collect and remove garbage to the Detroit sanitary works. The transportation of garbage through the streets by any one other than the contractor is prohibited by the ordinance.

The first question presented raises the validity of the ordinance. May the city, under the legislative authority conveyed upon it, delegate to a single person the exclusive right of collection? The term "garbage," as defined by the ordinance, includes only such matter as is either a nuisance in itself, or so nearly such as to come clearly within the police power of regulation. The disposal of this garbage is a duty imposed upon the city for the protection of public health. The manner and means to be employed in such disposal are within the determination of the common council. The city may itself seize and remove this refuse matter, or it may enter into a contract with one or more persons to do it. In either event it may prohibit all persons, except those authorized by it from interfering with the system which it adopts. In other words, with the power conferred upon the city to contract for this removal, there goes the duty to determine the means best adapted to attain the end in view. The common council has decided that its duty to safeguard the public health can best be discharged by entrusting the work of collection and removal to one responsible contractor under the supervision and control of the city. The passage of this ordinance was, I believe, within the province of the common council's legislative discretion, and the ordinance is, therefore, valid.

The second question presented is, whether the enforced removal of garbage through a designated collector infringes any property rights of the owner of the garbage. The defendant in this case was transporting what confessedly was garbage. It is well settled that no one may claim damages because of enforced obedience to a police regulation designed to secure and protect public health. It is manifest that, were individuals permitted to escape the regulation fixed by the common council and dispose of garbage as they severally saw fit, all system in the collection and removal of refuse matter would be destroyed. Even if this garbage have some value for some such use as that to which the respondent's employer put it, the feeding of hogs, the courts will not, at the expense of the public health, recognize that this refuse matter, in its legal aspect, is property. No property right has, therefore, been invaded.

The contract and ordinance in question being valid and the defendant from the undisputed testimony having violated the ordinance in the manner alleged, in the complaint, he must be adjudged guilty.

Therefore, gentlemen, I say to you that it is your duty in the matter to retire to your jury room and therein formulate a verdict of guilty. You will please retire and make up your verdict, gentlemen.

The respondent in the case will be fined ten dollars, and in default of the payment stand committed to the House of Correction for a period of five days.

26 EXHIBIT "D."

This agreement, made this 23rd day of April, A. D. 1901, by and between the City of Detroit, a municipal corporation, party of the first part, and the Detroit Sanitary Works, corporation of and under the laws of the State of Michigan, party of the second part:

Witnesseth, that for and in consideration of the conditions and covenants herein contained, to be performed by the party of the first part, and the payment of the money hereinafter set forth, the said party of the second part hereby agrees to collect, remove and dispose of all garbage and dead animals within the corporate limits of the city of Detroit, for the term of ten consecutive fiscal years, beginning July 1st, 1901, and ending June 30th, 1911, in accordance with the terms and conditions herein contained, and according to the specifications adopted by the common council of the city of Detroit, a copy of which is hereto attached, and the bid of said second party thereunder, a copy of which is also attached hereto.

1. Garbage shall be understood to consist of all refuse animal or vegetable matter, including dead animals, found within the city limits, coming from private or public premises within the city.

2. The time for making the collection of garbage and dead animals shall be as follows, to-wit:

(*a.*) Within and upon the public markets daily.

(*b.*) Within the two-mile circle as shown from the maps of the city, and from all hotels, restaurants, hospitals, slaughterhouses, and all other places where animals, game or fowl are killed within the said city of Detroit, collections daily.

(*c.*) Within all other portions of the city, collections three times in each week, times as nearly equally divided as possible.

The work of collecting said garbage shall be performed to the satisfaction and under the provision of the board of health.

(*d.*) The board of health shall have authority to order daily collections outside of the two-mile circle whenever in its judgment it is necessary. The health officer shall also have authority to order extra collections to be made at any time when necessary, the
27 contractor shall be required to cause such collections to be made within three hours of the time when such order is received by him.

(*e.*) Garbage shall be collected in and transported through the streets of the city in vehicles with water-tight closed metal boxes.

3. All garbage must be taken at least two miles outside of the limits of the city of Detroit and disposed of in such manner as to entail no damage or claim against the City of Detroit for such disposal.

4. It is expressly agreed that no garbage or other refuse collected by said contractor shall be dumped into the Detroit river or any of its tributaries, or into Lake Erie, or any other lake. The common council reserves the right to make such rules and regulations with reference to the collection of the garbage as may from time to time be deemed necessary. No employee of the contractor shall receive in the city of Detroit less than one and fifty one-hundredths dollars ($1.50) per day. In case said second party shall fail to collect garbage or dead animals in accordance with this contract, and such failure shall continue for the period of twenty-four (24) hours after a written notice from the board of health of the city of Detroit, then, and in such case, said second party shall be liable to and shall pay to the said party of the first part, the penalty of two dollars ($2.00) for each and every such failure so to do.

5. In consideration of the faithful performance of the foregoing conditions and covenants on the part of said second party, said first party hereby agrees to pay to the second party, its successors and assigns, the sum of five hundred and fifteen thousand dollars ($515,000), payable in equal monthly installments of four thousand two hundred and ninety-one and sixty-six and two-thirds hun-
28 dredths dollars ($4,291.66⅔) during the continuance of this contract. The city controller is hereby authorized to withhold payment of the amount due said second party from said first party under the contract upon the failure of said second party to comply with the terms of this contract.

6. It is hereby expressly agreed that the City of Detroit shall have the right to terminate this contract at the expiration of five years, to-wit: on the 30th day of June, 1906, upon the payment of fifteen hundred dollars to said Detroit Sanitary Works on or before this date. Said sum being the difference between the five and ten year bids of said company hereto annexed, and the same shall be paid and accepted as liquidated damages for the cancellation of said contract. Provided, that the City of Detroit shall by proper resolution of the common council, approved by the mayor, so declare and give written notice thereof to said Detroit Sanitary Works, one year prior thereto, to-wit: on or before June 30th, 1905. Otherwise this contract shall continue in full force and effect during said full period of ten years.

7. Said party of second part agrees to furnish a good and sufficient bond in the sum of fifty thousand dollars ($50,000), conditioned on its faithful performance of its part of this contract and conditioned to save the city harmless through any and all acts of said second party, and through any claims whatsoever for damages growing out of the disposal of garbage.

In witness whereof, the respective parties have hereunto set their respective corporate names and seals, in duplicate, on the day and

date first above written. The City of Detroit by the controller
29 thereunto duly authorized, and the Detroit Sanitary Works by the hand of its president and secretary thereunto duly authorized.

CITY OF DETROIT,
By F. A. BLADES, City Controller.

[Seal of Detroit.]

Attest:
JOHN A. SCHMID, City Clerk.

DETROIT SANITARY WORKS,
By JOSEPH B. MOORE, President.
M. H. CHAMBERLAIN, Secretary.

[Seal Detroit Sanitary Works.]

The Specifications.

Adopted by the Common Council January 19th and 22nd and Amended March 19th, 1901.

Specifications for Collection and Disposal of Garbage.

1. Garbage shall be understood to consist of all refuse animal and vegetable matter, including dead animals, found within the city limits, coming from private or public premises within the city.

2. The time for making the collection of garbage and dead animals shall be as follows, to-wit:

(a.) Within and upon the public markets daily.

(b.) Within the two-mile circle, as shown by the map of the city of Detroit, and from all hotels, restaurants, hospitals, slaughter houses and all other places where animals, game or fowl are killed within the said city of Detroit, collections daily.

(c.) The work of collecting said garbage shall be performed to the satisfaction and under the supervision of the board of health.

30 (d.) The board of health shall have authority to order daily collections outside of the two-mile circle whenever in its judgment it is necessary. The health officer shall also have authority to order extra collections to be made at any time when necessary. The contractor shall be required to cause such collections to be made within three hours of the time when such order is received by him.

(e.) Garbage shall be collected in and transported through the streets of the city in vehicles with watertight closed metal boxes.

3. All garbage must be taken at least two miles outside of the limits of the city of Detroit, and disposed of in such manner as to entail no damage or claim against the city of Detroit for such disposal.

4. Each bidder shall state and specify distinctly and clearly the process and system by which he intends to dispose of said garbage, but no bid shall be received which contemplates dumping the garbage into the Detroit river or any of its tributaries, or into Lake Erie, or any other lake.

5. The bidder will be required to deposit with the controller a certified check for $5,000 which shall be forfeited to the city if the bidder neglects to enter into a contract within five days after the acceptance of his bid or tender, to be returned in case the bid or tender is not accepted. The bidder will also be required to furnish a surety bond in the penal sum of $50,000, conditioned on the faithful performance of his part of the contract, and save the city harmless through any and all acts of his, and through any claim whatsoever for damages growing out of the disposal of garbage.

6. The common council reserves the right to make such rules and regulations with reference to the collection of said garbage as
31 may from time to time be deemed necessary. No employee of the contractor shall receive less than $1.50 per day. It is understood that the contract will contain a clause providing for a penalty not exceeding two dollars for each failure to collect garbage or dead animals and for withholding payment for failure to comply with the terms of the contract. Proposals are to be undersigned "Collection and disposal of garbage."

DETROIT, MICHIGAN, March 25, 1901.

Hon. F. A. Blades, controller, city of Detroit, Mich.

DEAR SIR: If the contract for the collection and disposal of garbage is awarded to us under our bids herewith submitted, we will dispose of the garbage at the factory now owned by us at French Landing, Mich., a reduction process known as the Detroit Liquid Separating Co. method, an inspection of which can be had at French Landing, also in several other leading cities of the United States.

[Seal of D. S. W.]

Yours truly, DETROIT SANITARY WORKS.
M. H. CHAMBERLAIN, Secretary.

DETROIT, MICH., March 25th, 1901.

Hon. F. A. Blades, controller, city of Detroit, Mich.

DEAR SIR: In respect to the advertisement of the city of Detroit for proposals for the collection and disposal of garbage in accordance with specifications on file in your office, dated March 20th, 1901, a copy of which are herewith enclosed; said proposals to be
32 opened March 25, 1901, at ten o'clock a. m., central standard time, we submit the following offer:

We will collect and dispose of the garbage for the term of five years from July 1st, 1901, to June 30th, 1906, inclusive, for fifty-one

thousand eight hundred dollars ($51,800) per annum, or for the entire period of five years the sum of two hundred and fifty-nine thousand dollars ($259,000), to be paid us in equal monthly installments.

DETROIT SANITARY WORKS.
M. H. CHAMBERLAIN, Sec'y.

Enclosed find check for five thousand dollars.

DETROIT, MICH., March 25th, 1901.

Hon. F. A. Blades, controller, city of Detroit, Mich.

DEAR SIR: In response to the advertisement of the city of Detroit for proposal of garbage in accordance with the specifications on file in your office dated March 20th, 1901, a copy of which we herewith enclose, said proposals to be opened March 25th, 1901, at ten o'clock a. m., central standard time, we submit the following offer.

We will collect and dispose of the garbage for the term of ten years from July 1st, 1901, to June 30th, 1911, inclusive, for the sum of fifty-one thousand five hundred dollars ($51,500) per annum, or a total for the entire period of five hundred and fifteen thousand dollars ($515,000), to be paid us in equal monthly installments.

[Seal D. S. W.]

DETROIT SANITARY WORKS.
M. H. CHAMBERLAIN, Sec'y.

Enclosed find check for five thousand dollars.

Writ of certiorari was duly allowed by Hon. William L. Carpenter, justice supreme court, July 2, 1903.

33 Return to Writ of Certiorari.

THE PEOPLE
vs.
JAMES GARDNER.

Complaint.

Frederick V. Wilson, agent of the Detroit sanitary works, city contractor, being first duly sworn, makes complaint and says, that at the city of Detroit aforesaid, on the 26th day of March, A. D. one thousand nine hundred and three, within the corporate limits of the city, to wit, in alley in rear of the Griswold house, situated on the corner of Grand River and Griswold street-; also in alley in rear of Ste. Claire hotel, situated on corner of Monroe and Randolph streets, one James Gardner did then and there unlawfully and wilfully carry, convey and transport through the streets and alleys of the city of Detroit, garbage, he not being the city contractor or its agent, to

the evil example of all others in the like case offending; and contrary to the ordinances of said city, in such case made and provided, section 3, chapter 86, page 244, of Revised Ordinances of 1895, as amended June 11, 1901.

(Signed) FREDERICK V. WILSON.

Sworn and subscribed to before me this 1st day of April, A. D. 1903.

(Signed) JOHN A. GROGAN,
Clerk of the Recorder's Court.

34 Summons.

STATE OF MICHIGAN, County of Wayne, City of Detroit, } ss:

The Recorder's Court of the City of Detroit.

To the superintendent or any member of the Metropolitan police of said city, Greeting:

In the name of The People of the State of Michigan, you are commanded to summon James Gardner, who is hereby commanded to be and appear before the recorder's court of the city of Detroit, at the court room of said court, in the Municipal Court building, so-called, corner of Clinton and Raynor streets, in the city of Detroit, on Tuesday, the seventh day of April, A. D. 1903, at 9:30 o'clock a. m. local time, then and there to answer unto a complaint filed against him for violation of an ordinance of said city relative to garbage, which shall then and there be made to appear; and of this writ make due return. [SEAL.]

Witness, the Honorable Alfred J. Murphy, recorder of the city of Detroit, this second day of April, in the year of our Lord, one thousand nine hundred and three.

(Signed) JOHN A. GROGAN, Clerk.
——— ———, Deputy Clerk.

MEMORANDUM.—The above case is on call for trial on the date herein named; if respondent do not appear, a warrant for his arrest forthwith will issue.

Any information desired relative to said complaint can be obtained by calling before the trial thereof, at the office of the clerk of said court, third floor, Municipal Court building, between the hours of 9 o'clock a. m. and 4 p. m.

JOHN A. GROGAN, Clerk.

Plea.

At a session of the recorder's court of the city of Detroit, held in and for said city, at the court room of said court, on Tuesday, the seventh day of April, in the year of our Lord nineteen hundred and three.

Present: Hon. Alfred J. Murphy, recorder of the city of Detroit, and Hon. James Phelan, judge of the recorder's court of the city of Detroit.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
JAMES GARDNER.

Complaint for Violating an Ordinance Relative to Garbage.

Said defendant having been arraigned in open court and having heard the complaint on file against him read, pleads not guilty to the charges therein alleged.

(Signed) ALFRED J. MURPHY,
Recorder of the City of Detroit.

35 At a session of the recorder's court of the city of Detroit, held in and for said city, at the court room of said court, on Friday, the eighth day of May, in the year of our Lord nineteen hundred and three.

Present: Hon. Alfred J. Murphy, recorder of the city of Detroit, and Hon. James Phelan, judge of the recorder's court of the city of Detroit.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
JAMES GARDNER.

Complaint for Violating an Ordinance Relative to Garbage.

(Before Judge Murphy.)

Now comes said defendant, by Joseph H. Clark, Esq., his counsel, and demands a trial by jury.

(Signed) ALFRED J. MURPHY,
Recorder of the City of Detroit.

At a session of the recorder's court of the city of Detroit, held in and for said city, at the court room of said court, on Friday, the twenty-second day of May, in the year of our Lord nineteen hundred and three.

Present: Hon. Alfred J. Murphy, recorder of the city of Detroit, and Hon. James Phelan, judge of the recorder's court of the city of Detroit.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
JAMES GARDNER.

Complaint for Violating an Ordinance Relative to Garbage.

(Before Judge Murphy.)

On consent of counsel, it is ordered, that said cause be peremptorily set for trial Wednesday, May twenty-seventh, nineteen hundred and three, at 9:30 o'clock a. m.

(Signed) ALFRED J. MURPHY,
Recorder of the City of Detroit.

36 At a session of the recorder's court of the city of Detroit, held in and for said city, at the court room of said court, on Wednesday, the twenty-seventh day of May, in the year of our Lord nineteen hundred and three.

Present: Hon. Alfred J. Murphy, recorder of the city of Detroit, and Hon. James Phelan, judge of the recorder's court of the city of Detroit.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
JAMES GARDNER.

Complaint for Violating an Ordinance Relative to Garbage.

(Before Judge Murphy.)

Said defendant being in open court and ready for trial, the court proceeded to impanel a jury.

Now comes counsel for the defense and files a challenge to the array herein, and assistant corporation counsel having demurred to the said challenge, the court sustains said demurrer and proceeds with the impaneling of a jury. Thereupon come to compose a jury, namely, Wm. Cicotte, Thos. Duane, Wm. T. Hurd, Milton Henwood, Martin F. Hennessy, Aaron Perlstein, Archibald Sinclair, John T. Crowley, Albert O. Wilford, Leopold Tobianski, Wm. F. Trebein and James Cummings, who are duly elected, tried and sworn, set together, and in the presence of the defendant, hear the evidence in the case in full.

Now comes Assistant Corporation Counsel Charles E. Love and moves the court for the direction of a verdict of guilty; and thereupon comes Fred A. Baker, counsel for the defendant, and moves the court for a direction of a verdict of not guilty. The court thereupon hears the arguments in part of the several counsel upon the motions as aforesaid.

(Signed) ALFRED J. MURPHY,
Recorder of the City of Detroit.

37 At a session of the recorder's court of the city of Detroit, held in and for said city, at the court room of said court, on Thursday, the twenty-eighth day of May, in the year of our Lord nineteen hundred and three.

Present: Hon. Alfred J. Murphy, recorder of the city of Detroit, and Hon. James Phelan, judge of the recorder's court of the city of Detroit.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
JAMES GARDNER.

Complaint for Violating an Ordinance Relative to Garbage.

(Before Judge Murphy.)

In this case, the court, upon the request of the defendant's counsel and the waiver of his presence in further proceedings herein, hears the conclusion of arguments of the several counsel upon the motions made herein and takes the same under advisement.

(Signed) ALFRED J. MURPHY,
Recorder of the City of Detroit.

At a session of the recorder's court of the city of Detroit, held in and for said city, at the court room of said court, on Saturday, the sixth day of June, in the year of our Lord nineteen hundred and three.

Present: Hon. Alfred J. Murphy, recorder of the city of Detroit, and Hon. James Phelan, judge of the recorder's court of the city of Detroit.

38 THE PEOPLE OF THE STATE OF MICHIGAN
vs.
JAMES GARDNER.

Complaint for Violating an Ordinance Relative to Garbage.

(Before Judge Murphy.)

The jury heretofore impaneled in this cause came into court again and in the presence of the defendant hear the instructions of the court as to their verdict, retire to formulate their verdict, having been absent for a time, return into court again and in accordance with the instructions of the court, find said defendant guilty as charged.

The court thereupon ordered said defendant to pay a fine of ten dollars or in default thereof be committed to the Detroit House of Correction for the period of ten days.

It is ordered by the court, that the respondent be given a twenty days' stay of proceedings herein in which to perfect an appeal.

(Signed) ALFRED J. MURPHY,
Recorder of the City of Detroit.

STATE OF MICHIGAN, County of Wayne, City of Detroit, } ss:

I, John A. Grogan, clerk of the recorder's court of the city of Detroit, do hereby certify that the foregoing is correctly taken and copied from the original record in the case of The People of the State of Michigan vs. James Gardner, now remaining in my office, and of record in said court, and that the same has been examined and compared by me with the original of said record in said cause, and that it is a correct transcript therefrom, and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed the seal of said court, at Detroit, this twenty-third day of June, in the year one thousand nine hundred and three.

JOHN A. GROGAN, Clerk.

39 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the 24th day of February in the year of our Lord one thousand nine hundred and four.

Present: The Honorable Joseph B. Moore, chief justice; William L. Carpenter, Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, associate justices.

THE PEOPLE, Plaintiff,
vs.
JAMES GARDNER, Defendant. }

This cause coming on to be heard is argued by Mr. Corliss for the plaintiff, by Mr. Fred A. Baker for the defendant and submitted.

STATE OF MICHIGAN, ss:

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this — day of —— in the year of our Lord one thousand nine hundred and —.

——, Clerk.

40 Supreme Court of the State of Michigan.

THE PEOPLE
vs.
JAMES GARDNER.

Opinion.

The defendant was convicted of a violation of an ordinance of the city of Detroit relative to the disposition of garbage. The ordinance requires all occupants of dwellings, hotels, etc., to provide suitable water-tight boxes in which all garbage and refuse matter shall be placed; provides that the city may enter into a contract for the disposition of such garbage; makes it the duty of such contractor to remove all garbage in accordance with certain expressed regulations, and prohibits all others from carrying or transporting such garbage through the streets. The ordinance defines garbage as the refuse of animal, fruit or vegetable matter that attends the preparation, use, cooking, dealing in or storing of meat, fish, fowl, fruit, or vegetables, including dead animals and condemned foods found within the city. The defendant does not deny having gathered and transported the refuse from the tables of hotels, which refuse answers the description contained in the ordinance, but shows that he was acting for the purchaser of such material, who bought the same from hotel proprietors. That such refuse had a money value as food for swine, and contends that the ordinance in question is not only unreasonable, but unconstitutional, as an attempt to take private property without compensation.

The trial judge declared the ordinance valid, and, as the facts were not in dispute, directed a verdict of guilty. Defendant brings the case here for review on questions of law.

A challenge to the array of jurors was made, on the ground that the act creating the board of jury commissioners of Wayne county is in conflict with the twentieth amendment. This law was held constitutional in People *vs.* Harding, 53 Mich. 40, and while the objection that the provisions of the statute violate the fourteenth amendment, was not there made, yet the reasoning in the case goes far toward answering that contention as it is now made. We are agreed that the contention cannot be sustained.

It was also contended that the jury in this class of cases are judges of both the law and facts and that the recorder, in instructing the jury as to the law, invaded the province of the jury. It is not claimed that any provision of the statute can be pointed out which gives the jury in the recorder's court such power, but the reasoning is that, as in ordinance cases tried before the police justices the jury are judges of the law and facts, it is to be inferred that the legislature, in conferring jurisdiction upon the recorder's court to try such cases, must have intended that it would be attended by the same in-

cidents. And if the statute is to have any other construction the fourteenth amendment is again invoked. The contention does not commend itself to us as sound. It would be equally logical to say that as in trials before justices of the peace the jury determines both the law and facts, the same practice should obtain on appeal, or in all cases in which the circuit and justices' courts have concurrent juris-tion.

41 The defendant attacks the validity of the ordinance as it relates to garbage or refuse from the tables of hotels. Similar ordinances have been before the court and sustained in People *vs.* Gordon, 81 Mich, 306, and Grand Rapids *vs.* De Vries, 123 Mich. 570. In these cases the question of whether there is a property right in refuse was not raised in the form in which it is here presented, although in the case last cited it was quite plainly implied that the common council, in the exercise of the police power, had the right to treat as a nuisance all such refuse as is unfit for human food.

The court may well take judicial notice that table refuse when dumped into receptacles kept for that purpose will speedily ferment and emit noisome odors, calculated to affect the public health. If in providing against such a nuisance, the owner of such material suffers some slight loss, the inconvenience or loss is presumed to be compensated in the common benefit secured by regulation.

Horr and Burns, Mun. Corp., sec. 220.

The precise question involved in the present case was considered in the well reasoned opinion of Judge Shepard in Dupont *vs.* District of Columbia, 20 Appeal Cases, D. C. 477, and the conclusion reached fully sustains the holding of the trial judge.

See also State *vs.* Orr, 68 Conn. 101.

The court in Dupont's case distinguished between garbage and dead animals, and by so doing distinguished some of the cases cited by defendant's counsel which hold that it is not competent to declare a dead animal to be a nuisance immediately after death. The reasoning in Dupont's case commends itself to us and we are disposed to follow it.

Judgment is affirmed.

R. M. MONTGOMERY.
FRANK A. HOOKER.
JOSEPH B. MOORE.
WILLIAM L. CARPENTER.

Grant, J., did not sit.

(Endorsed:) Filed June 25, 1904. Chas. C. Hopkins, clerk supreme court.

42 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the 25th day of June in the year of our Lord one thousand nine hundred and four.

Present: The Honorable Joseph B. Moore, chief justice; William L. Carpenter, Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, associate justices.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff,
vs.
JAMES GARDNER, Defendant. } No. 20024.

The record and proceedings in this cause having been removed to this court by writ of certiorari issued to the recorder's court of the city of Detroit, and the same and the matters in error assigned having been seen and inspected and duly considered by the court, and no error appearing therein, therefore it is ordered and adjudged by the court that the judgment of said recorder's court of the city of Detroit be and the same is hereby in all things affirmed.

STATE OF MICHIGAN, ss:

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this — day of —— in the year of our Lord one thousand nine hundred and —.

[Seal of the Supreme Court of Michigan, Lansing.]

—— ——, Clerk.

43 Bond.

Know all men by these presents, that we, James Gardner as principal and Eli Cooper and Lester J. Cooper as sureties, all of Detroit, Michigan, are held and firmly bound unto the People of the State of Michigan in the full and just sum of five hundred dollars to be paid to the said The People of the State of Michigan, their certain attorney, successors or assigns to which payment well and truly to be made we bind ourselves our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 30th day of June 1904.

Whereas lately at a session of the supreme court of the State of Michigan in a suit pending in said court between The People of the State of Michigan, and the said James Gardner, defendant and appellant, a judgment was rendered against the said James Gardner, and the said James Gardner having obtained a writ of error and filed the same in the clerk's office of the said court to review and reverse the judgment in the aforesaid suit, and a citation directed to the People of the State of Michigan, citing and admonishing them

to be and appear before the Supreme Court of the United States at Washington, within twenty days from the date thereof;

Now the condition of the above obligation is such that if the said James Gardner shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

JAMES his x mark. GARDNER. [SEAL.]
ELI COOPER. [SEAL.]
LESTER COOPER. [SEAL.]

Witness
FRED A. BAKER.

Approved by
JOSEPH B. MOORE,
Chief Justice of the Supreme Court
of the State of Michigan.

(Endorsed:) Filed July 1, 1904, Chas. C. Hopkins, clerk.

44 Citation.

UNITED STATES OF AMERICA, ss:

To the People of the State of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within twenty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Michigan wherein The People of the State of Michigan are appellees and James Gardner as defendant and appellant is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph B. Moore chief justice of the supreme court of the State of Michigan, this 30th day of June, in the year of our Lord one thousand nine hundred and four.

[Seal of the Supreme Court of Michigan, Lansing.]

JOSEPH B. MOORE,
Chief Justice of the Supreme Court of the State of Michigan.

EASTERN DISTRICT OF MICHIGAN, ss:

On this 1st day of July, in the year of our Lord one thousand nine hundred and four, personally appeared Fred A. Baker before me, the subscriber, a notary public in & for the county of Wayne in

said district and State and makes oath that he delivered a true copy of the within citation to Hon. Timothy E. Tarsney, corporation counsel of the city of Detroit and attorney in the court below for the within named appellees & defendants in error, The People of the State of Michigan, on this 1st day of July 1904.

FRED A. BAKER.

Sworn to and subscribed the 1st day of July, A. D. 1904.

CASSIUS HOLLENBECK,
Notary Public, Wayne Co., Mich.

My commission expires Jan. 6th, 1905.

45 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Michigan before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of Michigan appellee and James Gardner defendant and appellant wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of
46 the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said James Gardner as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within twenty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of June, in the year of our Lord one thousand nine hundred and four.

[Seal of the Circuit Court, Eastern District, Michigan.]

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States
for the Eastern District of Michigan.

Allowed by
JOSEPH B. MOORE,
Chief Justice of the Supreme Court
of the State of Michigan.

46½ To the Supreme Court of the United States:

The execution of the within writ appears by the transcript of record hereto annexed.
Lansing, Mich., July 16, 1904.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

[Endorsed:] Supreme Court of the United States James Gardner plaintiff in error *v.* The People of the State of Michigan defendant in error Writ of error to supreme court of Michigan Fred A. Baker att'y for plaintiff in error, 605 Whitney bldg. Detroit Mich.

47 UNITED STATES OF AMERICA:

Supreme Court of the United States.

JAMES GARDNER, Plaintiff in Errror,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN, Defendant in Error.

Assignment of Errors.

And now comes the said plaintiff in error by Fred A. Baker, his attorney, and says that in the record and proceedings aforesaid and in the judgment aforesaid, there is manifest error in this, to-wit:

1. The court below erred in holding that section 3 of chap. 86, p. 244 of the Revised Ordinances of 1895, of the City of Detroit, as amended June 11, 1901, is not contrary to or in violation of the provision of the fourteenth amendment of the Constitution of the United States that no State shall deprive any person of life, liberty or property without due process of law.

2. The court below erred in holding that act No. 204, public acts of 1893 of the State of Michigan, as amended by act. No. 5 public

acts of 1895, creating a board of jury commissioners in the county of Wayne, is not contrary to or in conflict with the provisions of the fourteenth amendment of the Constitution of the United States that no State shall deny to any person within its jurisdiction the equal protection of the laws.

3. The court below erred in holding that the provisions of the charter of the city of Detroit creating the recorder's court and conferring on that court jurisdiction to try ordinance cases, as construed and enforced by the court below in this case, are not contrary to or in violation of the provisions of the fourteenth amendment of the Constitution of the United States that no State shall deprive any person of life, liberty or property without due process of law,
48 nor deny to any person within its jurisdiction the equal protection of the laws.

4. The court below erred in holding that the refuse from family and hotel tables and kitchens, commonly called garbage, or swill, is not property and is not of such value for feeding swine, as to be within the protection of the fourteenth amendment of the Constitution of the United States.

5. The court below erred in holding that the State of Michigan has power to deprive the owners of garbage of its value for feeding swine, without compensating them therefor, and can confiscate the same, without violating the fourteenth amendment of the Constitution of the United States.

6. The court below erred in overruling the assignments of error contained in the affidavit of James Gardner, the plaintiff in error, upon which the writ of certiorari from the supreme court of Michigan to the recorder's court of Detroit, was issued.

Wherefore plaintiff in error prays that the judgment aforesaid may be vacated and reversed.

FRED A. BAKER,
Attorney for Plaintiff in Error.

Detroit, July 8, 1904.

49 Supreme Court of the State of Michigan.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff and Defendant in Error,
vs.
JAMES GARDNER, Defendant and Plaintiff in Error.

STATE OF MICHIGAN, In Supreme Court, } ss:

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and determined in the above entitled cause by said supreme court, includ-

ing the written decision and reasons therefor, signed by the judges of said court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon, the citation with proof of service of copy thereof on the adverse party, and a copy of the bond to said adverse party, duly approved, together with the assignment of errors in the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at the city of Lansing, this sixteenth day of July in the year of our Lord one thousand nine hundred and four.

[Seal of the Supreme Court of Michigan, Lansing.]

____ ____,

Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 19,420. Michigan supreme court. Term No. 62. James Gardner, plaintiff in error, vs. The People of the State of Michigan. Filed July 18th, 1904. File No. 19,420.

UNITED STATES OF AMERICA.

Supreme Court of the United States

No. 320.

JAMES GARDNER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
DEFENDANTS IN ERROR.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO ADVANCE.

This is not a criminal case, it has not once been adjudicated by this Court upon the merits or otherwise, and it is not a revenue or other case in which the United States are concerned.

There is no rule of court which permits a motion to advance to be made in such a case as this.

My next objection to the motion is that the record has not been printed, and the Court therefore cannot say from an examination of the record whether it is a case that should be advanced, even if it is a case within the rules.

The learned counsel for the defendants in error urge as one of the grounds why the case should be advanced, that the record has not been printed, and it is therefore impossible for them to make a motion to dismiss the case.

The learned counsel overlook the fact that they can have the record printed out of its order, if they are willing to

pay for it. Although the Detroit Sanitary Works, the real party in interest in this case, is receiving an annual income of over $50,000 a year from the city of Detroit, it does not appear to be willing to invest $150.00 to have the record of this cause printed in advance of its regular order, and prefers to force the plaintiff in error to assume that burden, although he is a man of comparatively small means.

There is no ground upon which a motion to dismiss could be made, as the federal questions involved in the case were raised in the courts below in strict compliance with the decisions of this court upon the subject.

I assume that this court would neither advance or dismiss a case unless it had full and complete knowledge of the record in the case.

The federal questions in the case are:

(1) Whether the garbage ordinance of the city of Detroit, under which all the garbage produced by the hotels, restaurants and residences in the city is confiscated and turned over to the Detroit Sanitary Works, a private corporation, is due process of law, under the Fourteenth Amendment.

(2) Whether the act creating the Board of Jury Commissioners for the County of Wayne is not a violation of the Fourteenth Amendment.

(3) Whether the provisions of the act creating the Recorder's Court of the city of Detroit, authorizing the judges of that court in ordinance cases, to direct the jury to find a verdict of guilty, is not a violation of the Fourteenth Amendment.

These questions were raised in the trial court and in the Supreme Court of Michigan and were decided adversely to the plaintiff in error.

Garbage legislation in Washington, similar to that in Detroit,, was sustained in *Dupont vs. District of Columbia*, 20 App., D. C. 477, but the plaintiff in error and his counsel are not satisfied with these adverse decisions and seek to have the question determined by the Supreme Court of the United States.

The record in the case is not voluminous and whenever the clerk of the Supreme Court of the United States requests it, the plaintiff in error will pay for having it printed.

The questions presented involve important constitutional rights, and counsel for the plaintiff in error does not desire to prepare a brief under pressure of time.

Mr. Eli Cooper, the employer of the plaintiff in error, has filed a bill in the United States Circuit Court for the Eastern District of Michigan, to enjoin the city of Detroit and the Detroit Sanitary Works, from enforcing the ordinance. The defendants answered the bill; and thereupon a motion for an injunction *pendente lite* was argued and submitted, and it is now held by Swan, District Judge, under advisement.

The statement in this motion that the case should be advanced to prevent injury to the public health of the city of Detroit during the coming season, is not supported by any fact in, or outside, of the record.

The plaintiff in error removes garbage from three hotels in the city of Detroit to his farm two miles beyond the city limits in the same manner and with the same care as the Detroit Sanitary Works removes garbage from the city under the ordinance and contract in question. The only difference is that the Detroit Sanitary Works transports the garbage to its reduction works outside of the city limits, and converts it into commercial products, and the employer of the plaintiff in error removes it in the same way to his farm and feeds it to hogs, for which it is very valuable and suitable.

The question presented by the record is whether garbage can be so taken care of by the producer of it, as to be property within the protection of the constitution.

From time immemorial garbage, commonly known as swill, has been used to feed to hogs, and it is more suitable for that purpose than any other, if it is properly taken care of and fed daily before it can possibly ferment or decay.

The record in this case presents the question directly and unequivocably and not indirectly or argumentatively.

I respectfully submit that the motion to advance should be denied.

FRED A. BAKER,
Attorney for Plaintiff in Error.

FILE COPY.

Supreme Court U.
FILED
OCT 10 1905
JAMES H. MCKENNEY,

UNITED STATES OF AMERICA.

Supreme Court of the United States

October Term, 1905.

No. 62.

JAMES GARDNER,
Plaintiff in Error.
vs.
PEOPLE OF THE STATE OF MICHIGAN,
Defendants in Error.

Error to Supreme Court of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

FRED A. BAKER,
Attorney for Plaintiff in Error.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1905.

UNITED STATES OF AMERICA,

Supreme Court of the United States

JAMES GARDNER, Plaintiff in Error. vs. PEOPLE OF THE STATE OF MICHIGAN, Defendants in Error.	Error to Supreme Court of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On the 23rd day of April, 1901, the City of Detroit entered into a contract with the Detroit Sanitary Works, a Michigan corporation, giving it the exclusive privilege for ten years of collecting, removing and disposing of garbage and dead animals within the corporate limits of the city. The city agreed to pay to the company $515,000 in monthly installments of $4,291.66 2-3. The contract and the specifications therein referred to are as follows:

GARBAGE CONTRACT.

This agreement, made this 23rd day of April, A. D. 1901, by and between the City of Detroit, a municipal corporation, party of the first part, and the Detroit Sanitary Works, corporation of and under the laws of the State of Michigan, party of the second part:

Witnesseth, that for and in consideration of the conditions and covenants herein contained, to be performed by the party of the first part, and the payment of the

money hereinafter set forth, the said party of the second part hereby agrees to collect, remove and dispose of all garbage and dead animals within the corporate limits of the city of Detroit, for the term of ten consecutive fiscal years, beginning July 1st, 1901, and ending June 30th, 1911, in accordance with the terms and conditions herein contained, and according to the specifications adopted by the common council of the city of Detroit, a copy of which is hereto attached, and the bid of said second party thereunder, a copy of which is also attached hereto.

1. Garbage shall be understood to consist of all refuse animal or vegetable matter, including dead animals, found within the city limits, coming from private or public premises within the city.

2. The time for making the collection of garbage and dead animals shall be as follows, to-wit:

(*a.*) Within and upon the public markets daily.

(*b.*) Within the two-mile circle as shown from the maps of the city, and from all hotels, restaurants, hospitals, slaughterhouses, and all other places where animals, game or fowl are killed within the said city of Detroit, collections daily.

(*c.*) Within all other portions of the city, collections three times in each week, times as nearly equally divided as possible.

The work of collecting said garbage shall be performed to the satisfaction and under the provision of the board of health.

(*d.*) The board of health shall have authority to order daily collections outside of the two-mile circle whenever in its judgment it is necessary. The health officer shall also have authority to order extra collections to be made at any time when necessary, the contractor shall be required to cause such collections to be made within three hours of the time when such order is received by him.

(*e.*) Garbage shall be collected in and transported through the streets of the city in vehicles with water-tight closed metal boxes.

3. All garbage must be taken at least two miles outside of the limits of the city of Detroit and disposed of in such manner as to entail no damage or claim against the City of Detroit for such disposal.

4. It is expressly agreed that no garbage or other refuse

collected by said contractor shall be dumped into the Detroit river or any of its tributaries, or into Lake Erie, or any other lake. The common council reserves the right to make such rules and regulations with reference to the collection of the garbage as may from time to time be deemed necessary. No employes of the contractor shall receive in the city of Detroit less than one and fifty one hundredths dollars ($1.59) per day. In case said second party shall fail to collect garbage or dead animals in accordance with this contract, and such failure shall continue for the period of twenty-four (24) hours after a written notice from the board of health of the city of Detroit, then, and in such case, said second party shall be liable to and shall pay to the said party of the first part, the penalty of two dollars ($2.00) for each and every such failure so to do.

5. In consideration of the faithful performance of the foregoing conditions and covenants on the part of said second party, said first party hereby agrees to pay to the second party, its successors and assigns, the sum of five hundred and fifteen thousand dollars ($515,000) payable in equal monthly installments of four thousand two hundred and ninety-one and sixty-six and two-thirds hundredths dollars ($4,291.66⅔) during the continuance of this contract. The city controller is hereby authorized to withhold payment of the amount due said second party from said first party under the contract upon the failure of said second party to comply with the terms of this contract.

6. It is hereby expressly agreed that the City of Detroit shall have the right to determine this contract at the expiration of five years, to wit: on the 30th day of June, 1900, upon the payment of fifteen hundred dollars to said Detroit Sanitary Works on or before this date. Said sum being the difference between the five and ten year bids of said company hereto annexed, and the same shall be paid and accepted as liquidated damages for the cancellation of said contract. Provided, that the City of Detroit shall by proper resolution of the common council, approved by the mayor, so declare and give written notice thereof to said Detroit Sanitary Works, one year prior thereto, to wit: on or before June 30th, 1905. Otherwise this contract shall continue in full force and effect during said full period of ten years.

7. Said party of second part agrees to furnish a good and sufficient bond in the sum of fifty thousand dollars ($50,000), conditioned on its faithful performance of its

part of this contract and conditioned to save the city harmless through any and all acts of said second party, and through any claims whatsoever for damages growing out of the disposal of garbage.

In witness whereof, the respective parties have hereunto set their respective corporate names and seals, in duplicate, on the day and date first above written. The City of Detroit by the controller thereunto duly authorized, and the Detroit Sanitary Works by the hand of its president and secretary thereunto duly authorized.

CITY OF DETROIT,
By F. A. BLADES, *City Controller.*

(Seal of Detroit.)
Attest:
JOHN A. SCHMID, *City Clerk.*

DETROIT SANITARY WORKS,
By JOSEPH B. MOORE, *President.*
M. H. CHAMBERLAIN, *Secretary.*

(Seal Detroit Sanitary Works.)

The Specifications
Adopted by the Common Council January 19th and 22nd and Amended March 19th, 1901.

Specifications for Collection and Disposal of Garbage.

1. Garbage shall be understood to consist of all refuse animal and vegetable matter, including dead animals, found within the city limits, coming from private or public premises within the city.

2. The time for making the collection of garbage and dead animals shall be as follows, to wit:

(*a.*) Within and upon the public markets daily.

(*b.*) Within the two-mile circle, as shown by the map of the City of Detroit, and from all hotels, restaurants, hospitals, slaughterhouses and all other places where animals, game or fowl are killed within the said City of Detroit, collections daily.

(*c.*) The work of collecting said garbage shall be performed to the satisfaction and under the supervision of the board of health.

(*d.*) The board of health shall have authority to order daily collections outside of the two-mile circle whenever in its judgment it is necessary. The health officer shall also have authority to order extra collections to be made at any time when necessary. The contractor shall be required to

cause such collections to be made within three hours of the time when such order is received by him.

(c.) Garbage shall be collected in and transported through the streets of the city in vehicles with watertight closed metal boxes.

3. All garbage must be taken at least two miles outside of the limits of the City of Detroit, and disposed of in such manner as to entail no damage or claim against the City of Detroit for such disposal.

4. Each bidder shall state and specify distinctly and clearly the process and system by which he intends to dispose of said garbage, but no bid shall be received which contemplates dumping the garbage into the Detroit river or any of its tributaries, or into Lake Erie, or any other lake.

5. The bidder will be required to deposit with the controller a certified check for $5,000 which shall be forfeited to the city if the bidder neglects to enter into a contract within five days after the acceptance of his bid or tender, to be returned in case the bid or tender is not accepted. The bidder will also be required to furnish a surety bond in the penal sum of $50,000, conditioned on the faithful performance of his part of the contract, and save the city harmless through any and all acts of his, and through any claim whatsoever for damages growing out of the disposal of garbage.

6. The common council reserves the right to make such rules and regulations with reference to the collection of said garbage as may from time to time be deemed necessary. No employe of the contractor shall receive less than $1.50 per day. It is understood that the contract will contain a clause providing for a penalty not exceeding two dollars for each failure to collect garbage or dead animals and for withholding payment for failure to comply with the terms of the contract. Proposals are to be undersigned "Collection and disposal of garbage." (Record, pp. 19, 21.)

June 11, 1901, the common council of the city amended the garbage ordinance to read as follows:

Garbage Ordinance.

Section 1. It is hereby made the duty of the occupant or occupants of every dwelling house or other building in the City of Detroit to provide a suitable and water-tight

box or other vessel of a convenient size to be handled by the garbage collector, in which such occupant or occupants shall cause to be placed or deposited all offal, garbage and refuse, animal and vegetable matter of the premises.

Such occupants shall keep such box or other vessel in the alley in rear of such premises, or at a place on the premises most accessible to the person collecting the garbage and offal, and it shall be unlawful to put any but refuse animal and vegetable matter in the vessel used for garbage and offal.

Provided, that if the said receptacle is placed in the alley it shall be provided with a tight cover, properly hinged, and shall be located next to the lot line, and from which it shall not project more than two feet into the alley.

Sec. 2. The word "garbage" shall be held to include every refuse accumulation of animal, fruit or vegetable matter that attends the preparation, use, cooking, dealing in or storing of meat, fish, fowl, fruit or vegetables, including dead animals and condemned foods found within the city limits. All garbage shall be collected in water-tight closed metal boxes, and such boxes shall be purified as often as the health officer may direct, and shall have painted thereon the word "Garbage."

Sec. 3. It is hereby made the duty of the contractor with the City of Detroit for the collection and removal of garbage and dead animals to collect and remove in accordance with the ordinances and contract of the city, all garbage, dead animals, fish and refuse animal and vegetable matter found within the city limits. No other person or party except the city contractor or its agents shall carry, convey or transport through the streets, alleys or public places of the City of Detroit such materials, and it shall be unlawful for any person to interfere in any manner with the collection and disposal of such materials by the city contractor.

Sec. 4. It shall be unlawful for any person to deposit, throw or place any garbage, fish, dead animals or refuse animal or vegetable matter in any avenue, alley, street or other public place within the City of Detroit; nor shall any person place such materials upon any private property, whether owned by such person or not, unless the same shall be enclosed in proper vessels or boxes, as provided in section 1.

Sec. 5. The collection and removal of garbage shall be under the supervision of the board of health and it shall be the duty of the board of health and police department,

through their proper officials and agents, to enforce the provisions of this ordinance.

Sec. II., chapter 87, and all other ordinances in conflict herewith are hereby repealed.

Sec. 2. This ordinance shall take immediate effect.

Approved June 11, 1901.

(Record, p. 8.)

April 1, 1903, Frederick V. Wilson, an agent of the Detroit Sanitary Works, filed a complaint in the Recorder's Court of the City of Detroit charging James Gardner with a violation of section 3 of the above ordinance, in that, "on the 26th day of March, A. D. one thousand nine hundred and three, within the corporate limits of the city, to wit: in the alley in the rear of the Griswold House, situated on the corner of Grand River and Griswold streets; also in the alley in rear of Ste. Claire Hotel, situated on the corner of Monroe and Randolph streets, one James Gardner did then and there unlawfully and wilfully carry, convey and transport through the streets and alleys of the City of Detroit, garbage, he not being the city contractor or its agent, to the evil example," etc. (Record, p. 23).

Process having been issued on the complaint, Gardner pleaded not guilty, and demanded a jury trial (Record, p. 26).

The case came in for trial before the Hon. Alfred J. Murphy, Recorder of the City of Detroit, on the 27th day of May, 1903. A jury was drawn, when the defendant filed a written challenge to the array, which will be hereafter set forth. A demurrer to the challenge was sustained (Record, pp. 4, 26, fol. 36).

The jury were then sworn and the trial proceeded with. Counsel for the city introduced in evidence the garbage contract and ordinance above set forth (Record, p. 12).

The other evidence is set forth in the record in detail, but the facts on which the questions of law depend are:

1. The Detroit Sanitary Works, under the contract, collects garbage in wagons having metallic boxes. These boxes when filled with garbage are moved from the wagons to railroad cars, and taken to a point twenty miles from the city, where the garbage is reduced to valuable by-products, principally grease, used in making candles and soap (Record, p. 12, fol. 16).

2. The defendant Gardner collected garbage in the

same way, the only difference being that he took the garbage along the public streets, in wagons, to a point two miles out of the city, where his employer, Eli Cooper, feeds it to swine (Record, pp. 14, 15).

The wagon boxes used by the defendant are better than those used by the Detroit Sanitary Works, in this, that the covers have a flange running around the edge of the box and fitting down into it, so that the garbage is less liable of being spilt out, as the wagons are drawn along the streets (Record, p. 16, fol. 22).

3. The defendant's employer pays the Griswold House $7.00 a month, and the Hotel Ste. Claire $5 a month, for their garbage, and agrees to remove it twice a day in summer time, and once a day in the winter (Record, p. 14, fol. 20).

4. The evidence as to the value of garbage is in accord with the common knowledge of the country, that it is one of the best of feeds for swine (Record, p. 15, fol. 21).

At the close of the testimony—

"Mr. Love, attorney for the People, thereupon moved the court to instruct the jury to bring in a verdict of guilty.

Mr. Baker, on behalf of the respondent: If the court please, on behalf of the defendant, I ask the court to instruct the jury that this is an ordinance case and they are the judges of law and fact; and in that connection I ask permission in the argument to the jury to discuss the law.

(Then follows a discussion of the request made by Mr. Baker, asking the court to instruct the jury that they were judges of law and fact and for permission to argue the questions of law and fact to the jury, after which the court overruled and denied the request; to which ruling defendant's counsel excepted.)

Counsel for defendant thereupon requested the court to charge the jury that the ordinance was unreasonable and void and to bring in a verdict of not guilty. And further, that the garbage or swill accumulated at these hotels is property and that the common council of the City of Detroit has no right to confiscate it or dispose of it, and can only regulate the handling of it; that is, they can only adopt such reasonable requirements as protect the public health, and cannot go beyond that under the police power, unless they compensate the owner for the property. That

if the State of Michigan, either by its legislature or its courts, deprives the owners of property, of this property without compensation, by such an ordinance as this, they deprive them of their property without due process of law and deny them the equal protection of the laws guaranteed by the 14th amendment of the Constitution of the United States. That so far as this swill is property it is entitled to the protection of the Constitution, and that this ordinance is unreasonable and void, because it undertakes to dispose of that property without compensation and without any regard to the question whether it has been properly stored. And asks the court to instruct the jury for that reason to bring in a verdict of not guilty." (Record, p. 17.)

The court instructed the jury to find a verdict of guilty, and fined the defendant ten dollars, and in default of payment to imprisonment in the House of Correction for ten days (Record, p. 18).

CHALLENGE TO THE ARRAY.

The grounds of the challenge were:

1. The lists of jurors from which said jury was drawn and summoned were not made and returned by the supervisors, assessors or aldermen of the several wards of the City of Detroit as provided by section 318 of the 1 Comp. L. of 1897, p. 231.

2. The lists of jurors from which said jury were drawn and summoned were made out and returned by the board of jury commissioners for the county of Wayne, created by act No. 204 of the public acts of Michigan, 1893, p. 337.

3. Under the constitution and general laws of Michigan the lists of petit jurors for the trial of civil or criminal cases in courts of record are permitted and required to be made by local officers elected by the people in each township and ward of the city, and the jurors are required to be taken from the assessment roll of the township or ward, and act No. 204 of the public acts of 1893 authorizing a board of commissioners appointed by the governor of the State, with the consent of the State senate, to select and return the lists of petit jurors for service in the courts of record sitting in said county is in conflict with the provisions of the fourteenth amendment of the Constitution of the United States that no State shall deprive any person of life, liberty or property without due process of law, nor

deny to any person within its jurisdiction the equal protection of the laws.

4. The constitutional and legal nature of a jury trial is such that the denial to one part of the people of the State of the right to be tried by locally selected jurors is a denial of the equal protection of the laws within the meaning of the fourteenth amendment of the Constitution of the United States.

5. Act No. 204 of the Michigan Public Acts of 1893, p. 337, is in conflict with the fourteenth amendment of the Constitution of the United States and is unconstitutional and void.

6. Said act is in conflict with the provisions of the constitution of Michigan that one supervisor and one township clerk shall be elected in each township and that a sheriff shall be elected in each county, and that in every criminal prosecution the accused shall have a right to a speedy and public trial by an impartial jury.

Wherefore the said defendant prays that the said jury impaneled for the trial of this cause may be quashed. (Record, pp. 4, 5.)

Counsel for the prosecution demurred to the challenge, and the demurrer was sustained by the court (Record, p. 26).

The case was reviewed by the Supreme Court of Michigan on a writ of certiorari, and the judgment below was affirmed (Record, pp. 28-31).

The defendant sued out a writ of error from the Supreme Court of the United States, and filed an assignment of errors as follows:

ASSIGNMENTS OF ERROR.

And now comes the said plaintiff in error by Fred A. Baker, his attorney, and says that in the record and proceedings aforesaid and in the judgment aforesaid, there is manifest error in this, to-wit:

1. The court below erred in holding that section 3 of Chap. 86, p. 244, of the Revised Ordinances of 1895, of the City of Detroit, as amended June 11, 1901, is not contrary to or in violation of the provision of the fourteenth amendment of the Constitution of the United States that no State

shall deprive any person of life, liberty or property without due process of law.

2. The court below erred in holding that act No. 204, Public Acts of 1893 of the State of Michigan, as amended by act No. 5 Public Acts of 1895, creating a board of jury commissioners in the County of Wayne, is not contrary to or in conflict with the provisions of the fourteenth amendment of the Constitution of the United States that no state shall deny to any person within its jurisdiction the equal protection of the laws.

3. The court below erred in holding that the provisions of the charter of the City of Detroit creating the Recorder's Court and conferring on that court jurisdiction to try ordinance cases, as construed and enforced by the court below in this case, are not contrary to or in violation of the provisions of the fourteenth amendment of the Constitution of the United States that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

4. The court below erred in holding that the refuse from family and hotel tables and kitchens, commonly called garbage, or swill, is not property and is not of such value for feeding swine, as to be within the protection of the fourteenth amendment of the Constitution of the United States.

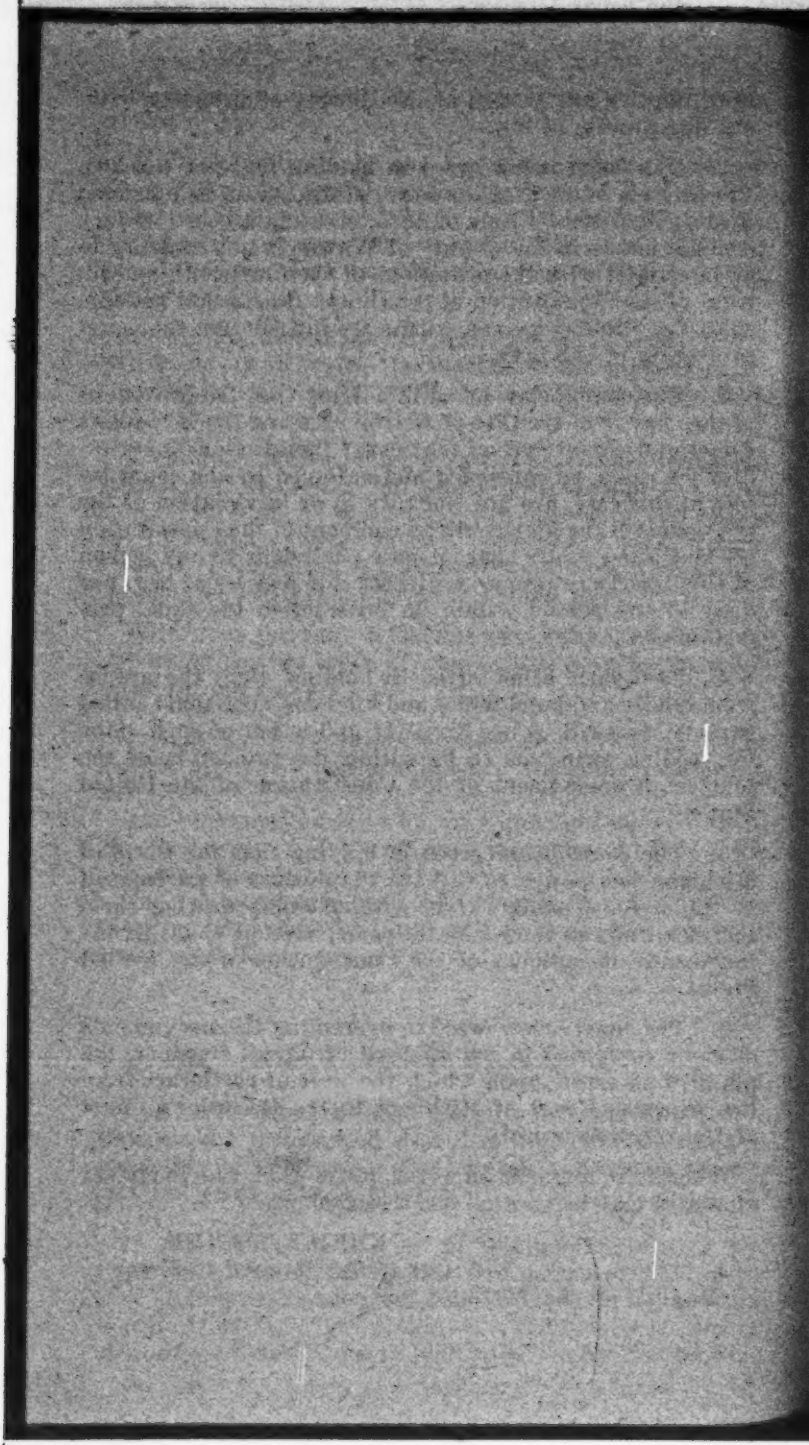
5. The court below erred in holding that the State of Michigan has power to deprive the owners of garbage of its value for feeding swine, without compensating them therefor, and can confiscate the same, without violating the fourteenth amendment of the Constitution of the United States.

6. The court below erred in overruling the assignments of error contained in the affidavit of James Gardner, the plaintiff in error, upon which the writ of certiorari from the Supreme Court of Michigan to the Recorder's Court of Detroit, was issued.

Wherefore plaintiff in error prays that the judgment aforesaid may be vacated and reversed.

FRED A. BAKER,
Attorney for Plaintiff in Error.

(Record, pp. 34, 35.)



I.

Sec. 3 of the Garbage Ordinance of the City of Detroit deprives the producers and owners of garbage of their property without due process of law.

The record in this case shows that the refuse from the kitchens and tables of residences, hotels and restaurants is valuable (1) as a food for swine, and (2) for the manufacture of merchantable grease and other products.

These facts are also a part of the common knowledge of the country and of which this court will take judicial notice. (*Schollenberger vs. Pennsylvania*, 171 *U. S.*, 1, 7-8.)

Garbage is inevitable; it must be produced; and its creation or manufacture cannot be prohibited. Police regulations for the protection of the public health must necessarily relate to two different parts or branches of the subject.

1. Regulations providing for the placing of the garbage in cans, or barrels, or other receptacles as it accumulates in the kitchen or on the premises of the owner or occupant.

2. Regulations for the daily, or other longer or shorter periodical removal of the garbage, in the same or other receptacles, from the city.

Even in England, where the courts have no power to invalidate an act of parliament, an act which it is impossible to execute, is regarded as void. It needs no argument to show that a law or ordinance which prohibited the peeling of apples, potatoes and other vegetables, or compelled the people to eat all the refuse of the table and kitchen would be void, if for no other reason, because it could not be enforced with all the power of the courts and a large standing army.

When we come to consider the police regulations which may be adopted to control the creation and removal of garbage, it is necessary to keep in view the division of the subject which I have pointed out.

The ordinance and contract in question in this case recognizes this distinction. The ordinance prescribes the manner in which the occupant of a dwelling or other build-

ing shall care for garbage on his premises. He must place it in a suitable water tight box or other vessel of convenient size to be handled by the garbage collector, and he must keep this box or vessel in the alley or at some place on his premises most accessible to the garbage collector, and if kept in the alley, it must have a tight cover, properly hinged, and it must not project into the alley more than two feet.

The ordinance makes it "unlawful for any person to deposit, throw or place any garbage, fish, or dead animals or refuse animal or vegetable matter in any avenue, alley, street or any other public place within the City of Detroit, whether owned by such person or not, unless the same shall be inclosed in proper vessels or boxes," as required by the ordinance.

It will be observed, that the garbage contractor has nothing whatever to do with these police regulations or with their enforcement. All the contractor is required to do is to remove the garbage from the boxes or vessels in which it has been placed by the occupants of buildings.

The contract provides that the contractor shall daily remove the garbage from the public markets, and from all hotels, restaurants, hospitals, slaughter houses, and from other places where animals, game or fowl are killed, and from the two-mile circle, as shown on the map of the city. Within all other portions of the city collections are required to be made three times each week, the week to be as nearly equally divided as possible. Daily collections may be ordered by the Board of Health outside of the two-mile circle when in its judgment it is necessary. The garbage is to be collected and transported through the streets of the city in vehicles with water tight closed metal boxes, and it must be taken at least two miles out of the city and disposed of in such manner as to entail no damage or claim against the City of Detroit for such disposal.

The vessels or boxes in which the garbage has been placed by occupants must under this contract be emptied into the metal wagon boxes in which it is to be transported. There is no provision for having it transported in the same boxes or vessels in which it is placed by occupants of buildings.

The ordinance is in excess of and beyond the police power of the State, because it does not discriminate between those who properly care for and transport garbage, and those who do not.

The most instructive cases on the question are the cases in the Supreme Court of the United States relating to state quarantine laws. These cases are reviewed in *Smith vs. St. Louis & Southwestern Ry. Co.*, 181 *U. S.*, 248. At p. 255 the court says:

"It depends upon whether the police power of the state has been exerted beyond its province—exerted to regulate inter-state commerce—exerted to exclude without discrimination the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any proper quarantine*. The words in italics express an important qualification. The prevention of disease is the essence of a quarantine law."

In the following cases this Court held state quarantine or inspection laws void, as going beyond the police power.

In *Henderson vs. Mayor of New York*, 92 *U. S.* 259, the state laws in question imposed a tax of $1.50 on each passenger from a foreign country landing in New York, and it was claimed to be valid as an exercise of the police power of the state. The court answered that argument as follows:

"It is said that the purpose of the act is to protect the state against the consequences of the flood of pauperism emigrating from Europe and first landing in that city."

"But it is a strange mode of doing this to tax every passenger alike who comes from abroad."

"The man who brings with him important additions to the wealth of the country and the man who is perfectly free from disease and brings to aid the industry of the country a stout heart and a strong arm are as much the subject of the tax as the diseased pauper who may become the object of the charity of the city the day after he lands from the vessel."

In *Railroad Co. vs. Husen*, 95 *U. S.*, 465, a Missouri statute which provided that no Texas, Mexican or Indian cattle should be brought into the state between the first day of March and the first day of November in each year, was held invalid.

"It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'you shall not bring into the state any Texas cattle, any Mexican cattle or Indian cattle between

March 1 and November 1, in any year, no matter whether they may do any injury to the inhabitants of the state or not; and if you do bring them even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.' Such a statute we do not doubt, it is beyond the power of a state to enact."

In *Minnesota vs. Barber*, 136 *U. S.*, 313, a statute was held void, which provided that no fresh meats should be sold in the state unless the animals from which they were taken were inspected in the state before they were slaughtered. The court among other things said:

"But a law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the state, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the state of sound meats, the product of animals slaughtered in other states. It is one thing for a state to exclude from its limits cattle, sheep or swine actually diseased, or meats that by reason of their condition, or the condition of the animals from which they are taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different matter for a state to declare, as does Minnesota by the necessary operation of its statute, that fresh beef, veal, mutton, lamb or pork—articles that are used in every part of this country to support human life—shall not be sold at all for human food within its limits, unless the animals from which such meats are taken are inspected in that state, or as is practically said, unless the animal is slaughtered in that state."

In *Schollenberger vs. Pennsylvania*, 171 *U. S.*, 1, a state statute which prohibited the manufacture or sale within the state of oleomargarine was held invalid. At p. 10 the court said:

"The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does include the total exclusion even of an article of food."

In *Plessy vs. Ferguson*, 163 *U. S.* 537, 550, this court in an opinion by Mr. Justice Brown, said:

"Every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."

This case is within, if it is not even a clearer one, than the recent case of *Lochner vs. New York*, 198 *U. S.*, 45. In that case the constitutional right to enter into labor contracts not injurious to the public health, was sustained. In this case the right to a specific article of property is involved. That property is of such a nature that its production cannot be prohibited, and it must be stored, handled and disposed of in some way, and the question is, whether the owner of it can be deprived of it without compensation, if he will care for and transport it, in compliance with any regulations that have been or can be devised for the protection of the public health. Garbage can be placed in liquid and air tight barrels, cans or boxes, and thus transported from one end of the country to another without injury to the public and it would seem to be very unreasonable and unjust to say, that where the owner complies with every regulation the government has adopted for the public protection, he can be deprived of his right of property.

In *re Lowe*, 54 *Kan.*, 757, an ordinance of the City of Topeka authorized the mayor, with the consent of the council, to appoint and license two or more suitable persons, corporations or firms to act as city scavengers, and prohibited any other person from engaging in the business without procuring an appointment and license therefor.

The court held the ordinance void because it attempted to create a monopoly of a lawful calling and was in restraint of trade.

The opinion of the court cites *Gregory vs. New York*, 40 *N. Y.*, 273; *Niconlin vs. Lowry*, 20 *N. J. L.*, 391; *Richmond vs. Dudley*, 29 *Ind.* 112; In *re Nash & McCracken*, 23 *U. C. Q. B.* 181; *Regina vs. Johnston*, *U. C. Q. B.*, 549, and concludes:

"The power of the city council to license and regulate the business of scavengers is not now questioned, nor in view of the express authority contained in the statute above quoted, can their be any question of their power to make

and enforce all reasonable rules and regulations for the conduct of this disagreeable business. Under the authorities, and especially in view of the constitutional provision quoted, these regulations must leave a way open to every person who will comply with the requirements of the ordinance to engage, at least, in so much of the business of scavengers as relates to entering on private property and removing filth and garbage therefrom. This ordinance clearly authorizes the restriction of this business to two persons to be selected by the mayor thereby providing for a monopoly. This the mayor and council had no power to do. The ordinance under consideration is therefore void, and the petitioner is discharged."

Iler vs. Kost, 64 *Neb.* 710, an ordinance of the City of Omaha gave the exclusive right to a city contractor, to remove dead animals, garbage, ashes, filth, offal or other refuse matter from the city, and it was held void, in an able opinion by Holcomb, J., because it included things that were not per se a nuisance.

Garbage that is properly taken care of and is promptly and regularly removed from the city is not per se a nuisance.

A dead horse is not per se a nuisance, and an owner who will make a proper disposition of the carcass cannot be deprived of his property right. This was held in the well considered case of *Campbell vs. Dist. Col.*, 19 *App. D. C.* 131.

In the subsequent case of *Dupont vs. Dist. Col.*, 20 *App. D. C.* 477, relied upon by the learned counsel for the Detroit Sanitary Works, the court did not make the proper distinction between garbage properly taken care of and garbage treated by the producer as valueless and a nuisance on his premises although the court did qualify its opinion by making an exception of meat trimmings, fruit and vegetable parings and the like that are capable of unobjectionable uses. "These the owner cannot be compelled to throw away but might make any reasonable use of before they could become offensive."

The learned judge who wrote the opinion in that case failed to realize that rotten and decayed matter is not the ordinary product of the kitchen, and that the qualification laid down by him practically includes all garbage.

The cases cited by the learned counsel for the Detroit Sanitary Works have no application to this case.

It is difficult to see what use the learned counsel can make of the prohibitory liquor law case of *Boston Beer Co. vs. Massachusetts*, 97 *U. S.*, 25.

Intoxicating liquors as beverages are regarded by the public as injurious to the public health and morals, and their manufacture and sale can be prohibited by a state legislature; but their transportation into the state in original packages cannot be forbidden, as the person receiving them has the constitutional right to receive them for his own use. (*Vance vs. W. A. Vandercook Co.*, 170 *U. S.*, 438.)

In other words, the police power of a state cannot be used to deprive a person of a right secured to him by the Constitution of the United States. So in the present case the state has no power to deprive the owner of garbage of his right of property therein, as long as such owner keeps, cares for, handles and transports his garbage in compliance with all regulations designed to protect the public health.

Equally far fetched is the citation by the learned counsel of *Davis vs. Massachusetts*, 167 *U. S.* 43, sustaining the right of the common council of the City of Boston to regulate the use to be made of Boston Common and other parks of the city.

In *Northwestern Fertilizing Co. vs. Hyde Park*, 97 *U. S.* 659, the power of the village to suppress within its limits, reduction works like those of the Detroit Sanitary Works, as a nuisance in a thickly populated district was sustained.

The Detroit Sanitary Works were originally located in Detroit, but their necessary and inevitable condition, compelled a removal to a secluded spot in the country.

The location of markets in a city is clearly within the police power, and as said by the court in the case cited of *Natal vs. Louisiana*, 139 *U. S.* 621, "The case is too plain for discussion."

Fisher vs. St. Louis, 194 *U. S.*, 361, sustained an ordinance prohibiting dairy or cow stables within the city limits "without first having obtained permission so to do from the municipal assembly by proper ordinance," and the only question discussed or decided was whether the ordinance denied to the disfavored class, the equal protection of the laws.

Gundling vs. Chicago, 177 *U. S.*, 183, sustained the power of the city to require the payment of a license fee of $100.00 to sell cigarettes.

L'Hote vs. New Orleans, 177 *U. S.* 587, involved the validity of an ordinance of the city that "it shall be unlawful for any public prostitute or woman notoriously abandoned to lewdness to occupy, inhabit, live or sleep in any house, room or closet situate without" certain limits described in the ordinance, and it was held that a property owner within the limits to which prostitutes were confined, could not invoke the Constitution of the United States to enjoin the enforcement of the ordinance.

The injury to the property owner was indirect and was the result of an exercise of an undoubted power of government, like that of declaring war, which frequently results in great injury to private parties.

In *Walker vs. Jameson*, 140 *Ind.* 591, the ordinance *left it optional* with the householder whether he would have his garbage removed by the city garbage contractor, and if he did have him remove it, the ordinance fixed the compensation he was to make to the contractor at a trifle less than one-fourth of a cent a pound.

The case did not involve any question about the property rights of the householder and any language bearing on the question is obiter.

McCabe, J., filed an opinion concuring in the general conclusion reached, but dissenting from the obiter dicta.

At p. 604, he says:

"I cannot agree in all the reasoning in the foregoing opinion though I do not dissent from the general conclusion reached.

I am unable to concur in so much of the opinion as holds that persons whose business creates large quantities of slops and offal and which is of large value are liable to have the same taken from them and destroyed without compensation. I do not think it within the power of the legislature or the city to confiscate the private property of the citizen and destroy it, except upon necessity. I do not think there is any necessity to do so with such large quantities of offal and slops until its owners have refused to comply with reasonable regulations for the removal thereof by such owners."

The case of *Alpers vs. San Francisco*, 32 *Fed.* 503, did not present any question about the property rights of a owner of a dead animal which had not been slain for food. The questions passed on and considered were whether the "dead animal contract" in question was valid as between the parties to it, viz: the contractor and the City and Coun-

ty of San Francisco, and whether the court would enjoin the board of supervisors from passing a resolution violating the contract.

The court held that it would not enjoin the board from passing the proposed resolution, but would enjoin the city poundkeeper from delivering any dogs killed by him to any one but the dead animal contractor.

Alpers' contract is not fully set forth in the report of the case, but it does appear in the subsequent case of *National Fertilizer Co. vs. Lambert*, 48 *Fed. Rep.*, 458, cited by the learned counsel for the Detroit Sanitary Works.

It there appears that he was given "the exclusive right and privilege of removing from the city limits all carcases of such dead animals, not slain for human food, *as shall not be removed and so disposed of as not in any manner to become a nuisance*, within twelve hours next after the death of the same by the owner thereof, or the person in whose possession such animal may be at the time of its death, or by the immediate servant or employee of such owner or person."

This is the very qualification that should have been inserted in the garbage ordinance of the City of Detroit; and it is a legislative expression of the very distinction on which I rely.

The report of the case of *Sanitary Reduction Works vs. California Reduction Co.*, 94 *Fed. Rep.*, 693, does not show the terms of the contract with the city sufficiently to enable us to know whether the delivery of garbage to the contractor on the part of the householder was mandatory or voluntary, but was probably voluntary, after the manner of the Dead Animal Contract, as it imposed a charge of twenty cents a cubic yard on householders delivering their garbage to the contractor.

The report of the same case in the United States Circuit Court of Appeals, Ninth Circuit, 126 *Fed. Rep.*, 29, does not show the relations of the contractor towards the householders, but does show that the restrictions imposed upon scavengers were that no garbage should be removed from any houses, hotels, markets, etc., unless conveyed in closed vehicles constructed so as to conceal the contents from public view, and to prevent any smell escaping therefrom and to prevent the dropping of any such material on the public streets; and further prohibiting any person or corporation from dumping or placing garbage upon any land within said city and county or in any water or water ways within the said city and county.

The question whether householders, hotel proprietors

and others producing garbage have any property therein, which they can sell to anyone who will properly remove it without creating any nuisance does not appear to have been presented by the record or considered by the court.

The court calls attention to the fact that the regulations imposed did not deprive scavengers of their calling but simply required them to deliver the garbage collected by them to the city contractor.

While counsel for the opposing company claimed that the producers of garbage were deprived of their property, the case was not framed so as to raise the question, but proceeded on the theory that the producers treated their garbage as refuse and worthless material, and that they ought and should pay twenty cents a cubic yard for its removal.

In other words, the case of the producers who take proper care of their garbage, and sell it as a by-product of their kitchens and tables, was not before the court, and was not considered by it.

This is an important and decisive distinction. There are two kinds of garbage producers:

1. Those who reject their garbage as without value, and permit it to be collected and removed by the city or its authorized contractor or agent.

2. Those who take such care of their garbage as to prevent it from becoming a nuisance and sell it to those who remove it so as to avoid any menace to the public health.

The offal from a slaughter house is very valuable; and it is not reasonable to believe that the state or one of its municipalities under the pretense of preventing it from becoming a nuisance could confiscate it, by turning it over to a contractor, as in this case.

The police power of a state is very great, but it does not go as far as this.

II.

The Act of the Michigan Legislature creating the Board of Jury Commissioners for the County of Wayne, denies to accused persons and other litigants in that County the equal protection of the laws.

The general laws of Michigan contain the following provisions:

(318) Sec. 8. The supervisor and township clerk of each township, and the supervisor or assessors, as the case may be, and aldermen of each ward or assessment district in any city, shall, at the time appointed by law for the review of the assessment roll for each year, make a list of persons to serve as petit jurors, and a list of persons to serve as grand jurors for the ensuing year; but in no case shall one of their number be put upon such list.

(319) Sec. 9. The said officers shall proceed to select from the persons assessed on the assessment roll of the township or ward for the same year, suitable persons, having the qualifications of electors, to serve as jurors; and in making such selection, they shall take the names of such only as are not exempt from serving on juries, who are in possession of their natural faculties, and not infirm or decrepid, of good character, of approved integrity, of sound judgment, and well informed, and conversant with the English language, and free from all legal exceptions, and who have not made, and in whose behalf there has not been made, to the officers mentioned in the preceding section, any application to be selected and returned as jurors.

1 *C. L.*, 1897, p. 231.

The Wayne county jury law was passed in 1893 (Public Acts, 1893, p. 337), and amended in 1895 (Public Acts, 1895, p. 69). The difference between it and the general law is that the jury lists are made up and returned by a board of seven jury commissioners appointed by the governor of the state with the consent of the state senate, and that the names of the persons to be returned are not required to be taken from the assessment rolls.

The officers authorized by the general law to make and return the jury lists are elected by the people in their several townships (State constitution, Art. XI, Sec. 1), and

city wards (Id. Art. XV, Sec. 14, as construed by the State Supreme Court, *Attorney General vs. Detroit*, 20 *Mich.*, 108).

And it is a good challenge for cause that the name of a juror does not appear upon the assessment roll of his township or ward (*Schlacker vs. Mining Co.*, 89 *Mich.*, 253, 261).

We believe and respectfully submit, that the Wayne County Jury law is an unwarranted and unconstitutional discrimination against the people of that county.

The rules which govern in determining the validity of discriminating statutes have been settled by this court.

In *Connolly vs. Union Sewer Pipe Co.*, 184 *U. S.*, 540, the court in an opinion by Mr. Justice Harlan, after referring to a number of cases, at p. 560 said:

"These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute *all* except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the state. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a state, and agriculturalists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the state may legally prescribe.

"The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of

free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'"

In *Hayes vs. Missouri*, 120 *U. S.*, 68, a state statute which provided that in capital cases in cities having over 100,000 inhabitants the state should be allowed fifteen peremptory challenges to jurors, while elsewhere in the state it is allowed only eight such challenges, was not in conflict with the Fourteenth Amendment. The opinion of the court as delivered by Mr. Justice Field states the grounds of the decision at p. 71 as follows:

"In this country the power of the legislature of a state to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury. In our large cities there is such a mixed population; there is such a tendency of the criminal classes to resort to them, and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure there competent and impartial jurors. And to that end it may be a wise proceeding on the part of the legislature to enlarge the number of peremptory challenges in criminal cases tried in those cities. The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. Northern Pacific R. R. Co. vs. Herbert, 116 U. S., 642. The right to challenge is the right to reject, not to select a juror. If, from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained."

The opinion concludes:

"Allowing the state fifteen peremptory challenges in capital cases tried in cities containing a population of over 100,000 inhabitants is simply providing against the difficulty of securing, in such cases, an impartial jury in cities of that size, which does not exist in other portions of the state. So far from defeating, it may furnish the necessary means of giving that equal protection of its laws to all persons, which that Amendment declares shall not be denied to anyone within its jurisdiction."

It thus appears that there was a good substantial reason on which the statute was based. Such a reason must be found for every discriminating state statute.

Can the Michigan Wayne County jury law be sustained on any such ground? We think not.

Wayne County consists of one large and one small city and twenty rural townships, having a population, according to the census of 1900, as follows:

POPULATION OF WAYNE COUNTY.

Brownstown	7,031
Canton	1,218
Dearborn	2,752
Ecorse	6,675
Gratiet	1,333
Greenfield	2,360
Grosse Pointe	2,933
Hamtramck	3,078
Huron	1,978
Livonia	1,460
Monguagon	2,387
Nankin	3,812
Northville	2,371
Plymouth	2,098
Redford	1,990
Romulus	1,818
Springwells	12,034
Sumpter	1,495
Taylor	1,296
Van Buren	1,789
Detroit City	285,704
Wyandotte City	5,133
	348,793

The people of Wayne County are in the full enjoyment of the local self-government secured to them by the constitution of the state, and it is therefore not competent for the legislature of the state to declare that they are not fit by reason of their ignorance, or lawlessness, or otherwise, to elect local officers to perform the duty of making and returning the annual jury lists.

What we insist upon is, that the fact of incompetency and unfitness, which must be the basis of the discrimination, does not exist; and that this is conclusively shown by the constitution and laws of the state, which in every other respect than the jury lists, treat the people of Wayne

County as the equals of the people of the other counties of the state.

If this is not a classification and discrimination without a reason, what is it?

The learned judges of the Supreme Court of the United States may be reluctant to enter upon any such inquiry, and at the first blush be disposed to regard the conclusions of the state legislature and of the state Supreme Court as conclusive and binding; but we beg leave, most respectfully and deferentially, to suggest, that it is a jurisdiction and duty imposed by the constitution of the United States, and that when a state puts the ban of inferiority and a lack of civic virtue, on 350,000 people they are entitled to Federal protection.

The territorial discrimination is arbitrary, as it is not confined to the large City of Detroit, as in the Missouri case relating to the City of St. Louis, but is extended to twenty rural townships, where the population can have none of the characteristics of a city population, even if it can be held that a city population may have characteristics which would disqualify them from electing officers to return the jury lists, although the population of the state in general is regarded as fully qualified to perform that duty.

We submit the judgment of the Supreme Court of Michigan should be reversed.

FRED A. BAKER,
Attorney for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 320.

JAMES GARDNER, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

MOTION TO ADVANCE.

Counsel for appellee submits motion to advance this cause for hearing during the present term and at as early a day as the convenience of the court will permit.

STATEMENT.

For the protection of the health of the people of the City of Detroit, the Common Council in 1889 adopted an ordinance regulating the collection and disposal of garbage and contracted for the performance of the work. In 1901 the ordinance was amended and a new contract made for a term of years.

By the terms of the ordinance, garbage is held to include "every refuse, accumulation of animal, fruit or vegetable matter that attends the preparation, use, cooking, dealing in or storing of meat, fish, fowl, fruit or vegetable, and condemned foods." It provides for the maintenance by householders of proper receptacles and the collection and transportation of the material in metal boxes by the contractor, prohibiting all other parties from interfering therewith.

In April, 1903, complaint in the Recorder's Court of the City of Detroit was made against James Gardner, appellant, for unlawfully collecting and transporting through the streets of the city of Detroit garbage. Said cause was tried before Hon. Alfred J. Murphy, Recorder, and a jury in May, 1903. At the conclusion of the trial the court directed a verdict against defendant and charged the jury:

> "It is undisputed that the defendant conveyed through the streets of the city what the ordinance herein evoked defines as garbage. The term as employed embraces only articles which were unsuitable for human food. The ordinance does not extend to anything that is fit for human consumption. * * * It is well settled that no one may claim damages because of enforced obedience to a police regulation designed to secure and protect public health. * * * Even if this garbage have some value for some such use as that to which the respondent's employer put it, the feeding of hogs, the Court will not, at the expense of the public health, recognize that this refuse matter, in its legal aspect, is property. No property right has, therefore, been invaded."

An appeal was taken to the Supreme Court of the State of Michigan, and the judgment below affirmed June 25th, 1904. In the opinion of the Supreme Court, Justice Montgomery stated:

> "The defendant attacks the validity of the ordinance as it relates to garbage or refuse from the tables of hotels. Similar ordinances have been before the court and sustained in People vs. Gordon, 31 Mich., 306, and Grand Rapids vs. De Vries, 123 Mich., 570. In these cases the question of whether

there is a property right in refuse was not raised in the form in which it is here presented, although in the case last cited it was quite plainly implied that the common council, in the exercise of the police power, had the right to treat as a nuisance all such refuse as is unfit for human food.

The court may well take judicial notice that table refuse, when dumped into receptacles kept for that purpose, will speedily ferment and emit noisome odors, calculated to affect the public health. If, in providing against such a nuisance, the owner of such material suffers some slight loss, the inconvenience or loss is presumed to be compensated in the common benefit secured by regulation.

Horr and Burns, Mun. Corp., Sec. 220.

The precise question involved in the present case was considered in the well-reasoned opinion of Judge Shepard in Dupont vs. District of Columbia, 20 Appeal Cases, D. C., 477, and the conclusion reached fully sustained the holding of the trial judge.

See also State vs. Orr, 68 Conn., 101.

The Court, in Dupont's case, distinguished between garbage and dead animals, and by so doing distinguished some of the cases cited by defendant's counsel, which hold that it is not competent to declare a dead animal to be a nuisance immediately after death. The reasoning in Dupont's case commends itself to us, and we are disposed to follow it.

Judgment is affirmed."

The appeal in this case from the Supreme Court of Michigan was immediately taken by appellant and the case docketed July 18th, 1904, and is No. 320 on the docket for the present term. Counsel for appellee are informed by the clerk that the case will not be reached in regular call of the docket before the early part of the October term, 1905. The record has not been printed and will not be reached in order for printing until some time next summer. It is therefore rendered impossible for appellee's counsel to move to dismiss.

Notwithstanding the judgment of the Michigan state courts, Mr. Eli Cooper, for whom said James Gardner, appellant, and others were employed, continues to collect and transport through the streets of Detroit, contrary to the ordinance of the city, garbage; and upon being again complained of in the Recorder's Court, said Eli Cooper, with the hope of protecting said Gardner and other employees in the unlawful work, filed a bill of complaint in the United States Circuit Court for the Sixth Circuit and Eastern District of Michigan, Southern Division, in Equity, against the City of Detroit and the Detroit Sanitary Works, contractor, and thereby sought to restrain the City of Detroit from further prosecutions under said ordinance and the contractor from the uninterrupted performance of the work under the contract. The joint answer of the defendants to said bill of complaint was filed in September, 1904, denying all of the rights of complainant and embracing the record and proceedings of the Recorder's, and Supreme Court of the State of Michigan. In November, 1904, arguments were submitted to the judge of said court upon the motion of complainant for an injunction against defendants, but a decision has not been rendered.

Said appellant, James Gardner, and others continue to violate said ordinance and ignore the rights of the City of Detroit to the great detriment of the health of the people and the proper regulations established by the city, several complaints being now pending against them in the Recorder's Court.

The willful and persistent violation of said police regulation of the city has inspired and will continue to encourage violations by others, and unless a decision can be obtained by this court before the warm weather of the summer, it is feared that great injury to the health of the people may result.

In view of the importance to the health of the people of the City of Detroit of the enforcement of these police regu-

lations, and the willful and persistent wrong-doing of appellant, we respectfully ask that this cause may be advanced under the rules and practice of this court and an early hearing thereof ordered.

TIMOTHY E. TARSNEY,
Corporation Counsel.

JNO. B. COBLISS,
Counsel for Appellee.

To F. A. Baker, Esq., Counsel for Appellant:

Take notice, that we have filed in the above entitled cause the following motion to advance the same in order to obtain an early hearing thereof; that said motion has been printed and will be presented to the Court at Washington on Monday, February 20th, 1905, at the opening of Court on said day.

TIMOTHY E. TARSNEY,
Corporation Counsel.

JNO. B. COBLISS,
Counsel for Appellee.

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NOV 8 1904
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 62.

JAMES GARDNER,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN.

BRIEF FOR DEFENDANT IN ERROR.

T. E. TARSNEY,
CORLISS, LEETE & JOSLYN,
Attorneys.

JOHN B. CORLISS,
Of Counsel.

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No. 62.

JAMES GARDNER,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The complainant in this case charges the plaintiff in error with a violation of an ordinance of the City of Detroit regulating the collection and disposal of the refuse known as garbage.

It appears from the undisputed evidence that plaintiff in error on the day charged in the complaint collected garbage from the Griswold House and St. Clair Hotels in a wagon with a large wooden box and transported the same through the streets of the City of Detroit to a hog pasture in the Township of Springwells, in violation of the provisions of said ordinance (R. pp. 7-8).

The character of the material thus collected is clearly shown by the testimony of James Cluff, who was, on the day mentioned, employed in the kitchen of the Griswold House.

He testified:

> "I know what kind of garbage was allowed to go through the chute of the Griswold House on that day. Everything of the refuse from the house, such

as parings of the vegetables, any rotten vegetables, fruit, and all refuse from the butcher shop, such as spoiled fish. I seen some very badly spoiled fish go into it; spoiled meat, rotten bananas, banana peelings; all the refuse from the table, such as lettuce with vinegar on it scraped off the plates as it came from the table by the dishwasher; all the meats, gravies, anything that was left on the plate, scraps of pie. Everything; all the refuse from the house went into the garbage.

Record, page 8.

On cross-examination he said:

"The garbage that he took was the accumulation of 24 hours. I saw four fish that were decayed. * * * All kinds of fruit and such leavings as came from the dining-room table went into the garbage. Anything that went to the table was considered fresh, but when they put vinegar on lettuce and such stuff as that, and then going in on top of these gravies and meats, and such stuff, it naturally would sour."

Record, page 9.

Dr. John E. Clark, county chemist, testified:

"I heard the testimony of the last witness (Cluff) in reference to the material that was gathered from the Griswold house kitchen and put into defendant's wagon. The effect upon the material, if thrown into the receptacle or chute, such as described, during the day and permitted to stand there 24 hours would be that decomposition would take place. * * * Decomposition would commence almost immediately in most cases; dependent to a certain extent upon the temperature."

Record, pages 9, 10.

Under a contract then in force between the City of Detroit and the Detroit Sanitary Works, the contractor bound itself to collect and remove from the City of Detroit, all of the garbage from time to time accumulated by householders, hotels, restaurants, etc., under special regulations providing for the collection and transportation thereof in metal boxes, etc.; that the same was transported twenty

miles from the city, where the same was reduced by what is known as the "reduction system."

Record, page 12, *Contract Ex. "D," page* 19.

It is admitted that defendant had no authority whatever from the city to collect this material.

The important facts established by the evidence are:

1st: Collection and transportation of garbage through the streets of the city and in violation of the ordinance by plaintiff in error.

2nd: The garbage collected was composed of the refuse from the hotel kitchen, embracing spoiled meats, fish, entrails of birds and fowls, decayed fruits and vegetables, table refuse such as pieces of cooked meats, gravies, pies, bread crumbs, spices, salads, tea, coffee, etc., both hot and cold.

3rd: The proprietors of the hotel had caused this material to be dumped into the receptacle kept for garbage, in accordance with the provisions of the ordinances of the city.

4th: When such materials are dumped into garbage receptacles, fermentation and decomposition commences almost immediately, producing noxious odors and unhealthy poisonous compound.

5th: The contractor is under bonds to daily collect all the garbage of the city, and the health officer may require the contractor to remove garbage at any time, and as often as the public health may require.

6th: Any interference with the efficient performance of the contract and the enforcement of regulations imposed for the preservation of the health of the people, especially in hot weather, might prove very damaging.

GARBAGE REGULATIONS.

The ordinance, section 1, requires all occupants of dwellings, hotels, etc., to provide suitable water-tight boxes, into which shall be placed all garbage and refuse, animal and vegetable matter of the premises.

Sections 2 and 3 are important, and, therefore, printed in full as follows:

> "Sec. 2. The word 'garbage' shall be held to include every refuse accumulation of animal, fruit or vegetable matter that attends the preparation, use, cooking, dealing in or storing of meat, fish, fowl, fruit or vegetables, including dead animals and condemned foods found within the city limits. All garbage shall be collected in water-tight closed metal boxes, and such boxes shall be purified as often as the health officer may direct, and shall have painted thereon the word 'garbage.'
>
> "Sec. 3. It is hereby made the duty of the contractor with the City of Detroit for the collection and removal of garbage and dead animals to collect and remove in accordance with the ordinances and contract of the city all garbage, dead animals, fish and refuse animal and vegetable matter found within the city limits. No other person or party except the city contractor or its agents shall carry, convey, or transport through the streets, alleys or public places of the City of Detroit such materials, and it shall be unlawful for any person to interfere in any manner with the collection and disposal of such materials by the city contractor."

Section 4 provides a penalty for the violation of the ordinance.

Section 5 makes it the duty of the Board of Health and Police Department to enforce the provisions of the ordinance.

It is admitted that the proprietor of the hotel furnished the garbage receptacles required by the ordinance, and caused the garbage to be placed therein; that plaintiff in error removed it from the garbage receptacle and transported it through the streets of the city. The refuse had been thrown away by the hotel proprietor as unfit for food. It consisted of various ingredients, some solid and some liquid. No effort was made to separate the good or wholesome material from the bad, decomposed fruits, fish, etc. Such mixtures commence to ferment almost immediately and decomposition is very rapid.

Record, page 10.

CHARTER PROVISIONS.

The City of Detroit has been lawfully clothed by the Legislature of the State with power to provide for the preservation of the health of the inhabitants of the city.

> "The Council shall have power to provide for the preservation of the general health of the inhabitants of the city, and to make regulations to secure the same; * * * to abate or remove any nuisance; * * * to prohibit and prevent any person from having on his premises any substance or thing that is unwholesome or nauseous; and to authorize the removal thereof; * * * The Common Council is also empowered to enact and provide, by appropriate ordinance, for the manner of collecting, transporting, conveying and handling of garbage, and all animal and vegetable matter and refuse in said city; * * * and to require all persons in said city to dispose of the same in the manner provided by said Common Council in said ordinance for the removal and destruction thereof, and to impose and enforce appropriate penalties for any violation of said ordinance."
>
> *Sec. 43, Chap. 7, Par. 50, Charter of the City.*

Under a special act of the Legislature, the City of Detroit was further empowered:

> "That the Common Council shall have the power to advertise for proposals, and contract for the removal, disposition and destruction of garbage and all animal and vegetable refuse for a term of years."
>
> *Amendment to Charter, approved June 17, 1889.*

The general statutes of the State empower municipalities to enact ordinances for the preservation and protection of the inhabitants thereof, and the manner and means to be employed is left to the discretion of the Council of the city.

ARGUMENT.

The principal contention of plaintiff in error is that garbage is property which has value.

The disposal of garbage is a public duty imposed upon the municipality and clearly within its police powers. When the exercise of the police power is proper, the manner and means to be employed in its execution are addressed to the legislative and not the judicial discretion.

Garbage is per se a nuisance because the processes of fermentation and decay begin as soon as the different refuse materials are thrown together. In a short time it begins to throw off noxious gases deleterious to life. This is why the public authorities have determined that garbage shall be regularly and promptly collected and destroyed. The city may seize, control, remove and dispose of all garbage, or it may enter into a contract with one or more persons to do it. Such action is not objectionable as creating a monopoly or infringing the rights of property.

Such action by municipalities is not a violation of the constitutional inhibitions against the taking of or injury to private property without compensation or without due process of law. These principles are fully established by reliable authorities.

It is contended by counsel for plaintiff in error that the owner should be given an opportunity to dispose of his own garbage in his own way, so long as he otherwise follows the rules and regulations of the municipality with regard to its collection and transportation.

This may seem on its face, at first, quite plausible. It requires, however, but a moment's thought to disclose its fallacy. It establishes a theory impossible to work out in practice without nullifying the execution of the police power of the city.

Each householder then becomes the judge of the best means of disposing of his garbage, and in each case there is a likelihood of a conflict between the householders and the authorities only to be settled by the courts. With such a condition of things existing, the collection and disposal of garbage by the public authorities would be impossible.

Is it not clear that any refinement of reasoning about what are property or property rights, which results in taking away from the municipality the power of controlling the disposition of garbage, takes away from it the power of protecting the public health in this regard?

There is no possible way by which the plaintiff in error's theory can be made practical which does not lead directly to the destruction of the police power of the city to protect the public health with reference to the collection and disposal of garbage.

This is a contest by the hotels of Detroit in which they seek to uphold what they believe to be their right to sell their garbage. They are not, of course, open to criticism for undertaking to defend their supposed rights in the court, for that is the proper place to establish or defend any right which is assailed or denied. It should be remembered, however, that whatever rule is applied to these hotels must be applied to the householder in those localities where cleanliness is not a distinctive feature.

It is a matter of common knowledge that contagious diseases are most prevalent and dangerous in those localities where the laws of cleanliness are habitually violated, yet the people who live there necessarily must have the same right to sell and dispose of their garbage according to their notions of what is proper, as has the hotel.

It is claimed that garbage is valuable to feed to hogs. If this is true and it prevents the city from destroying garbage, it follows that all householders have the same right to fatten animals with it as has the hotel. Animals may be kept within the city limits as well as without, if the sanitary regulations of the city are obeyed. If the hotel may sell and transport its own garbage to fatten hogs outside of the city, why cannot the householder do the same, or fatten hogs in his back yard with the garbage from his own and his neighbor's tables, if he can buy garbage from the latter?

The first important authority involving precisely the principle now before the court was the case of Vandine, Petitioner, 6 Pick. 187. The ordinance of Boston prohibited anyone without a license to transport garbage through the streets of the city. The petitioner kept a large number of hogs in Cambridge, and was accustomed to purchase the garbage in Boston and haul it to his premises. Under the city ordinances the city authorities employed and paid certain parties to collect and dispose of the garbage and

licensed them for that purpose and declined to license anyone not so employed. At the trial in the municipal court the judge instructed the jury that it was the duty of the city to remove from the streets and houses all nuisances which might generate disease or interfere with the comfort of the inhabitants, and that it was both reasonable and proper that it should be in their discretion to contract with persons to perform the work, so that it might be done on a general system, and that such ordinance amounted to the prohibition of the nuisance, and that so far as it affected trade, it was not a restraint, but only a regulation of it. In the opinion of the Supreme Court of Massachusetts affirming the judgment of conviction of the petitioner, the Court said:

> "The great object of the city is to preserve the health of the inhabitants. To attain that, they wisely disregard any expense which is deemed to be requisite. They might probably have these offensive substances carried out of the city without any expense if they would permit the people from the country to take them away at such times and in such manner as would best accommodate them. Every one will see that if this business were thus managed there would be continual moving nuisances at all times, and in all the streets of the city, breaking up the streets by their weight and poisoning the air with their effluvia. * * * The direction and opinion of the judge of the municipal court was entirely correct."

Judge Dillon in his work on "Municipal Corporations," speaking of the last mentioned case, says:

> "An ordinance of a city prohibiting, under a penalty, any person not duly licensed therefor by the city authorities, from removing or carrying through any streets of the city any house dirt, refuse, offal or filth, is not improper in restraint of trade and is reasonable and valid. Such a by-law is not in the nature of a monopoly, but is founded on a wise regard for the public health. It was contended that the city could regulate the number and kind of horses and carts to be employed by strangers or unlicensed persons, but practically it was considered that the main object of the city could be better accomplished by employing men over whom they have entire control, night and day, who are at

hand, and able from habit to do the work in the best way and at the proper time."

The case of The State of Conn. vs. Orr, 68 Conn., 101 (34 L. R. A., 270), decided in 1896, is a case on all fours with the one under consideration. It involved the question of the validity of the garbage ordinance of the City of Bridgeport. The case was very elaborately argued. The counsel who contended against their validity made the following amongst other points:

> "The garbage in this case was fresh and its removal not dangerous to the public health. A by-law which assumes to be a police regulation but deprives a party of the use of his property without regard to the public good under the pretense of the preservation of health, when it is manifest that such are not the object or purpose of the regulation, will be set aside as a clear and direct infringement of the right of property without any compensating advantages. * * * The board of health has not the power to assume in advance what is or will become a nuisance or dangerous to the public health, and contract for its removal.

The Court, in negativing these and other points made by counsel for the defense uses the following language:

> "The charter of the City of Bridgeport conferred upon the Common Council ample power to regulate by ordinance the collection and removal of garbage and offal. The ordinance brought in question upon this proceeding deals only (par. 2) with 'such refuse matter as accumulates in the preparation of food for the table.' 'Refuse matter,' as the term is thus employed, can embrace nothing which has not been refused or rejected as unsuitable for table use. It may be thus rejected because it has little or no value for human food or because it is decayed or unwholesome. It must, in its nature, be perishable and can include little which is not liable to become decomposed or offensive if left where it falls. The Common Council, therefore, had authority to regulate its disposition in such a way as to prevent it becoming the occasion of a nuisance. Under these provisions and the authority of the special act of 1895, the board of health might contract with a single person to collect and remove

garbage from the entire city or with several persons to collect and remove it from as many different portions of the city. It might also make such contracts with respect to a part of the city, or to certain buildings in part of the city and leave the collection and removal of garbage from other places open to those who obtain from its clerk a proper permit, and provide proper means of transportation.

By neither method of procedure would any monopoly be created by which the common rights of citizenship would be infringed upon. Slaughterhouse cases, 16 Wall., 36; 21 L. ed., 394; Alpers vs. San Francisco, 32 Fed. Rep., 598; National Fertilizer vs. Lambert, 48 Fed. Rep., 458.) Nor did the absence in the charter of any expressed provision as to the grant of licenses to engage in this business prevent the Common Council from resort to that mode or regulation, since it was a business which, as usually carried on, is in its nature dangerous to the public health; and as carried on in Bridgeport might, under the act of February 28, 1895, have been made by the board of health the subject of a public contract. Over any such occupation a strict watch must be kept, and the general police powers vested in the city by par. 24 of its charter, in connection with the act of 1895, justify the implication of a right to limit the number of those who pursue it (State vs. Wordin, 56 Conn., 216, 226; Re Vandine, 6 Pick., 187; 17 Am. Dec., 351). The defendant offered evidence to show that he had been for many years engaged in the business of collecting and removing garbage in Bridgeport, in carts so constructed as to satisfy the requirements of the ordinance; and that he had applied to the clerk of the board for a license or permit, and met with a refusal. He also offered evidence, which was excluded, that permits had been previously issued to others; but that, before he applied, the board had instructed its clerk to issue no more to anyone. This evidence was properly excluded. The board of health having the right to limit the number of those engaged in this particular occupation, the defendant had no absolute title to a license. * * * The defendant offered evidence to show that all garbage collected by him came from certain restaurants, with the proprietors of which he had contracts for its removal. This

also was properly excluded. It was not claimed and cannot be assumed that such engagements had been entered into before the adoption of the ordinance. Without inquiring whether had the fact been otherwise the law would have been otherwise, it is sufficient as the case stands to say that no contract to perform an unlawful act can justify its performance.

The defendant further offered evidence to prove, and claimed that he did prove, that the garbage he collected was fresh, and some of it fit for food; and there was no evidence on either side tending to show that any of this garbage 'was sour or putrid, and for that reason dangerous to the public health.' In view of this defendant asked the Court to instruct the jury that 'the privilege of contracting to transport garbage is a liberty and property right, of which one cannot be deprived without due process of law, unless the jury find that such garbage, at the time of its transportation, is a nuisance and detrimental to health.' Such instructions were properly refused. It was a violation of the ordinance to collect and transport the kitchen refuse, which was its subject, whether such of it as was being transported at the time of the act complained of was noxious or innoxious. It was enough that it was 'such refuse matter as accumulates in the preparation of food for the table.' There is so much of this kind of matter that is offensive and dangerous to the health of the community that all may be properly made the subject of public supervision and control. The ordinance does not extend to anything that is separated and thrown aside in the preparation of food for the table."

In the case of Campbell vs. Dist. of Col., 19 App. D. C., 131, it was held that the owner had a right to remove a dead animal, because it was neithe offensive or in a condition to endanger the public health, if removed promptly after death. It is evident that decomposition in an animal does not occur until a day or two after death, and that nothing offensive, except as to sight, could occur in 48 hours; that a dead animal in itself is valuable.

Subsequently, in the case of Dupont vs. Dist. of Col., 20 App. D. C., 477, the identical question before this court was presented, where, as in this case, the party had a contract with the proprietors of the Riggs and National

Hotels for the collection and removal of garbage, for which he paid an annual compensation larger in amount than that paid by appellant to the hotels of Detroit. The police regulations and restrictions were identical with those of the City of Detroit. In fact, the contractor at Washington and Detroit are substantially the same party operating under precisely the same conditions, contract and system for the collection, removal and disposal of garbage. In that case, as in this, it was provided in the contract that the garbage should not be dumped into the river or exposed to the elements, and the Court justly held (p. 487):

> "The mere fact that the defendant was willing to buy garbage and use it for those purposes is not sufficient to remove it from the category of nuisances, and settle its character as property. Whilst money value is evidence, and sometimes very strong evidence, to that end, it is not of itself sufficient to make a case of unreasonableness or oppression against the law and the regulations under consideration. Some members of the community may be willing to expose their own health to danger through the use of noisome manures, and to eat the flesh of animals fed upon garbage, or to sell such flesh for food to others who may be unaware of its character, but their practices cannot make a rule of community observance. It is against the ignorance, the indifference, the selfishness, the avarice, the willful disregard of just and intelligent public opinion, that the police power must be constantly invoked on behalf of the common safety and advantage.
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> We have found no case directly deciding the question as presented in the case at bar, but several well-considered decisions, cited below, clearly establish the principle upon which we rest our conclusion: Vandine, Petitioner, 6 Pick., 187, 191; City of Grand Rapids vs. DeVries, 123 Mich., 570; State vs. Payssan, 47 La. Ann., 1029; State vs. Orr, 68 Conn., 101, 112; Walker vs. Jameson, 140 Ind., 591.
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> The police power is the emanation of that inborn principle of human nature which led men into society and created the body politic to which sovereignty pertains for the purpose of securing safety, order and the common weal. To these ends the government is intrusted with the power to make

reasonable regulations restrictive of individual impulse. As population increases in rapid proportion, new physical conditions are developed which suggest, as reasonable, regulations and restraints of person and property before unknown. As civilization advances with increased and deeper knowledge, science makes new discoveries in respect of the dissemination of disease through infection, which necessitate radical changes in methods for the protection of human life.

For these reasons it is apparent that no hard and fast rule can be laid down for the government of all cases arising out of the frequent exercise of the police power. Each case must turn upon its own peculiar circumstances and conditions, and it is only when these clearly show that the regulations or restrictions imposed have no substantial relation to objects within the police power and therefore constitute a palpable invasion of private right, that the courts are justified in denying their obligation. In Campbell vs. Dist. of Col., supra, we were of the opinion that the regulation, as applied to the facts of that case, was of such character.

The distinction between the two cases is clear. The carcass was valuable, had undergone no decay whatever, and was promptly removed in a wagon of approved construction. The death of a horse is of comparatively infrequent occurrence and not capable of producing constant, widespread apprehensions of danger or discomfort.

Garbage, as we have seen, is necessarily composed largely of matter noisome even before its deposit in the receptacles provided for it, and other material mingled with it must necessarily partake of its offensive character. Moreover, it is a thing of almost hourly accumulation in every occupied house of a large city, and is therefore a constant menace to the health and comfort of thousands of people. These conditions amply justify the application of a different rule as regards its collection, removal and final disposition."

The validity of the ordinance as well as the statutory power conferred upon the municipality has been repeatedly sustained by the Supreme Court of the State of Michigan (see Opinion, R., pp. 29-30).

The constitutional questions involved in this case were carefully considered by this court in the opinion of Justice Brown in the case of John C. Fisher vs. City of St. Louis, 194 U. S., 361, and our position fully sustained in the following language:

> "Defendant's main contention, however, is that, by vesting in the municipal assembly the power to permit the erection of dairy and cow stables to certain persons, a discrimination is thus declared in favor of such persons, and against all other persons, and the equal protection of the law denied to all the disfavored class. The power of the legislature to authorize its municipalities to regulate and suppress all such places or occupations as, in its judgment, are likely to be injurious to the health of its inhabitants, or to disturb people living in the immediate neighborhood by loud noises or offensive odors, is so clearly within the police-power as to be no longer open to question. The keeping of swine and cattle within the city or designated limits of the city has been declared in a number of cases to be within the police power. The keeping of cow stables and dairies is not only likely to be offensive to neighbors, but it is too often made an excuse for the supply of impure milk from cows which are fed upon unhealthful food, such as the refuse from distilleries, etc. (Re Linehan, 72 Cal., 114, 13 Pac 170; Quincy vs. Kennard, 151 Mass., 563, 24 N. E., 800; Love vs. Recorder's Court Judge, 128 Mich., 545, 55 L. R. A., 618, 87 N. W., 785.
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> We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public, and upon conditions applying to the health and comfort of the neighborhood. Crowley vs. Christiansen, 137 U. S., 86, 34 L. ed., 620, 11 Sup. Ct. Rep., 13; Davis vs. Massachusetts, 167 U. S., 43, 42 L. ed., 71, 77, 17 Sup. Ct. Rep., 731; Soon Hing vs. Crowley, 113 U. S., 703, 710, 28 L. ed., 1145, 5 Sup. Ct. Rep., 730."

The principle involved here was exhaustively considered in the opinion of Justice Day in the case of Caroline

W. Dobbins vs. City of Los Angeles, 195 U. S., 223. Justice Day wisely states:

> "It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community."

Justice Day cites with approval the language of the Court in the case of

Munn vs. Ills., 94 U. S., 113.

> "It is always a judicial question if any particular regulation of such right is a valid exercise of police power, though the authority of the courts to declare such regulation invalid will be exercised with the utmost caution and only when it is clear that the ordinance or law declared void passes the limits of the police power and infringes upon the rights guaranteed by the Constitution."

California Reduction Co. et al vs. Sanitary Reduction Works, 126 Fed. Rep., 29 (Circuit Court of Appeals). Justice Hawley in this case clearly distinguishes this character of cases from those embracing property rights. In discussing the police power the court states:

> "It had the power, as was held in the slaughter-house cases and in many of the other cases which we have cited, itself to regulate the removal and disposition of all garbage and refuse matter, and having this authority, it naturally follows that it had the power to contract with others to perform that duty. The general principles we have announced and several of the authorities we have cited furnish an answer to appellant's contention that the board of supervisors had no authority to confer an exclusive privilege or franchise. This question was involved in the Alpers and Lambert cases, where a similar contract was upheld."

The cases cited by the learned counsel for plaintiff in error have no application to this case.

Counsel persistently disregards the important facts in this case:

(a) The garbage collected by plaintiff in error was composed of the refuse from the kitchen and table of the hotels, embracing spoiled meats, entrails of birds and fowls, decayed fruits, vegetables, etc.

(b) The material had been discarded by the proprietors of the hotels and dumped into the garbage receptacle established in accordance with the provisions of the ordinances of the city.

(c) No effort had been made by the hotelkeeper to separate the vegetables and good meats from the decayed refuse.

(d) Such material dumped together immediately ferments and is per se a nuisance.

(e) The health of a municipality is paramount to any property interest in such abandoned refuse.

The constitutional right of trial by a jury is not infringed by the act of the Michigan Legislature creating the Board of Jury Commissioners for the County of Wayne. It seems needless to discuss this question in view of the Michigan cases.

People vs. Harding, 53 *Mich.*, 48.
People vs. Reilly, 53 *Mich.*, 260.

T. E. TARSNEY,
CORLISS, LEETE & JOSLYN,
Attorneys for Defendant in Error.

JOHN B. CORLISS,
Of Counsel.